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# EDITOR'S NOTE

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84-1903-ASX  
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ne 4, 1985

Title: Posadas de Pureto Rico Associates, dba Condado  
Holiday Inn, Appellant  
V.  
Tourism Company of Puerto Rico

Court: Supreme Court for the Commonwealth  
of Puerto Rico

Counsel for appellant: Soto, Maria Milagros

Counsel for appellee: Saldana, Lino J.

try	Date	Note	Proceedings and Orders
1	Jun 4 1985	G	Statement as to jurisdiction filed.
2	Jun 13 1985		Letter from petitioner in compliance with Rule 28.1 filed.
3	Jul 10 1985		DISTRIBUTED. September 30, 1985
4	Aug 9 1985	P	Response requested. (Due September 6, 1985 - NONE RECEIVED)
6	Sep 3 1985		Order extending time to file response to jurisdictional statement until September 30, 1985.
7	Sep 30 1985		Motion of appellees Tourism Co. of PR, et al. to dismiss or affirm filed.
8	Oct 2 1985		REDISTRIBUTED. October 18, 1985
9	Oct 21 1985		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. *****
2	Dec 5 1985		Order extending time to file brief of appellant on the merits until December 12, 1985.
4	Dec 5 1985	G	Motion of American Civil Liberties Union for leave to file a brief as amicus curiae filed.
5	Dec 3 1985	G	Motion of Association of National Advertisers, Inc. for leave to file a brief as amicus curiae filed.
6	Dec 11 1985	G	Motion of American Association of Advertising Agencies, Inc. for leave to file a brief as amicus curiae filed.
7	Dec 12 1985	G	Motion of Atlantic City Casino Association for leave to file a brief as amicus curiae filed.
8	Dec 16 1985		Motion of American Civil Liberties Union for leave to file a brief as amicus curiae GRANTED.
9	Dec 12 1985		Joint appendix filed.
0	Dec 12 1985		Brief of appellant Posadas de PR filed.
1	Dec 12 1985	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
2	Dec 12 1985	G	Motion of American Newspaper Publishers Association for leave to file a brief as amicus curiae filed.
3	Dec 12 1985	G	Motion of National Broadcasting Company, Inc. for leave to file a brief as amicus curiae filed.
4	Dec 12 1985	G	Motion of American Broadcasting Companies, Inc., et al. for leave to file a brief as amici curiae filed.
5	Dec 13 1985		Application for leave to file appellant's brief on the merits in excess of the page limitation filed (A-472),

ry	Date	Note	Proceedings and Orders
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	Dec 13 1985		and order granting same by Brennan, J., on December 16, 1985. The brief may not exceed 53 pages.
	Dec 13 1985		Application for leave to file appellant's brief on the merits in excess of the page limitation filed, and
	Dec 13 1985		order granting same by Brennan, J., on December 16, 1985. The brief may not exceed 53 pages.
	Jan 13 1986		Motion of American Association of Advertising Agencies, Inc. for leave to file a brief as amicus curiae GRANTED.
	Jan 13 1986		Motion of Atlantic City Casino Association for leave to file a brief as amicus curiae GRANTED.
	Jan 13 1986		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
	Jan 13 1986		Motion of American Newspaper Publishers Association for leave to file a brief as amicus curiae GRANTED.
	Jan 13 1986		Motion of National Broadcasting Company, Inc. for leave to file a brief as amicus curiae GRANTED.
	Jan 13 1986		Motion of American Broadcasting Companies, Inc., et al. for leave to file a brief as amici curiae GRANTED.
	Jan 13 1986		Order extending time to file brief of appellee on the merits until February 1, 1986.
	Jan 21 1986		Motion of Association of National Advertisers, Inc. for leave to file a brief as amicus curiae GRANTED.
	Jan 22 1986		Order further extending time to file brief of appellee on the merits until February 15, 1986.
	Jan 24 1986		Application filed by appellant to rescind extension of time to file appellee's brief on the merits granted by the Clerk presented to Justice Brennan, and order denying same by Justice Brennan on January 24, 1986.
	Jan 24 1986		Brief of appellee Tourism Co. of PR filed.
	Feb 15 1986		Record filed.
	Feb 22 1986		SET FOR ARGUMENT, Monday, April 28, 1986. (1st case)
	Mar 14 1986		CIRCULATED.
	Mar 14 1986		
	Apr 16 1986	X	Reply brief of appellant Posadas de PR filed.
	Apr 28 1986		ARGUED.

**JURISDICTIONAL**

**STATEMENT**

84-1903

No.

Supreme Court, U.S.  
FILED

JUN 4 1985

ALEXANDER L. STEVAS  
CLERK

IN THE

# Supreme Court of the United States

October Term, 1984

POSADAS DE PUERTO RICO ASSOCIATES, d/b/a  
Condado Holiday Inn,

*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

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## JURISDICTIONAL STATEMENT

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MARIA MILAGROS SOTO  
Banco Central Building  
Suite 815  
221 Ponce de Leon Avenue  
Hato Rey, PR 00917  
(809) 754-1920/1717  
*Counsel for Appellant*

June 4, 1985

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i.

### **The Question Presented.**

1. Whether Section 8 of the Games of Chance Act of the Commonwealth of Puerto Rico, as amended, is repugnant to the Constitution of the United States if it:

a) violates the Free Speech Clause guaranteed by the First Amendment, and the protected commercial speech rights thereunder, by absolutely banning all casino advertising to the public in Puerto Rico;

b) violates the Equal Protection Clause guaranteed by the Fourteenth Amendment when the state totally bans casino advertising in any manner, although gaming is a legal business activity in Puerto Rico, while not imposing such restrictions on other games of chance—such as, horse races, cock fights and the lottery—without a valid overriding state interest that could justify unequal treatment and the infringement of First Amendment rights;

c) violates the Due Process Clause embraced in the Fifth and Fourteenth Amendment due to the vagueness and overbreadth of the statute's no-advertising provision and its lack of definitions or reasonable standards for the interpretation of what constitutes "advertise or otherwise offer" a casino, or who is "the public of Puerto Rico" but prohibits all such conduct without time, place and manner speech restrictions nor reference to the truthfulness of the information provided.

2. Whether state action that completely suppresses dissemination of truthful information about entirely lawful activities requires a standard of strict judicial scrutiny under the United States Constitution and the United States Supreme Court precedents.

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No.

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1984.

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POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,

*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF PUERTO  
RICO

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**Jurisdictional Statement.**

Posadas de Puerto Rico Associates, the Appellant, appeals from the final Resolution of the Supreme Court of Puerto Rico, dated February 7, 1985, dismissing for want of a substantial constitutional question the Appeal of a final Declaratory Judgment of the San Juan Superior Court that upheld the constitutionality of Section 8 of Act 221 of May 15, 1948, as amended, (15 L.P.R.A. Sec. 78);

and by so doing, it affirmed the validity of a statute of the Commonwealth of Puerto Rico that is repugnant to the Constitution of the United States.

### **Opinions Below.**

Neither the Resolution of the Supreme Court of Puerto Rico, nor the final Declaratory Judgment and Opinion of Honorable Guillermo Arbona Lago, San Juan Superior Court, dated December 12, 1984, are reported.

They are both translated and included in the Appendix hereto. (App. A, p. 1a; App. B, p. 1b).

### **Jurisdiction.**

The Declaratory Judgment of the Superior Court of San Juan, holding that the interpretation and application by the Appellee, Tourism Company of Puerto Rico, of Section 8 of Act 221, *supra*, had been arbitrary, capricious, inconsistent, ambiguous, erratic, excessive, producing absurd results, and thus unconstitutional; but sustaining that the cited Section 8, from its face, was not unconstitutional, was appealed on January 14, 1985 by simultaneous filings before the Supreme Court of Puerto Rico and the San Juan Superior Court in accordance with the procedures and time limits set by Puerto Rico's Civil Rules of Procedures of 1979 and the regulations of the Supreme Court of Puerto Rico. The appeal is translated as Appendix C, p. 1c.

On February 7, 1985 the Supreme Court of Puerto Rico dismissed our petition both as an appeal and as a writ of certiorari, with the dissenting opinion of Justice Rebollo Lopez. A Motion of Reconsideration was immediately

filed on February 22, 1985 asserting that a total ban on free speech rights which constitutes an absolute prior censorship of all advertising of a legal business presents as substantial a constitutional question as is substantial our democratic system. (App. D, p. 1d). Rehearing was denied on March 7, 1985, Justice Rebollo Lopez dissenting again (App. E, p. 1e).

Notice of Appeal to the United States Supreme Court was filed on March 29, 1985 with the Clerks of the Supreme Court of Puerto Rico and the Superior Court of San Juan since the record had been sent to the Court below (App. F, p. 1f).

The Honorable Supreme Court of Puerto Rico acknowledged the notice of appeal by Resolution of April 11, 1985, translated as Appendix G, p. 1g.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1258 (2).

### **Constitutional Provisions, Law and Rules.**

First Amendment, United States Constitution:

"Congress shall make no law \* \* \* abridging the freedom of speech \* \* \*."

Fifth Amendment, United States Constitution:

"No person shall be \* \* \* deprived of life, liberty, or property, without due process of law \* \* \*."

Fourteenth Amendment, United States Constitution:

"Section 1. \* \* \* No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The Games of Chance Act of the Commonwealth of Puerto Rico, Act 221 of May 15, 1948, as amended (15 L.P.R.A. Sec. 78):

"Section 8. No gambling room shall be permitted to advertise or otherwise offer their (*sic*) facilities to the public of Puerto Rico."

Gaming Regulations, 15 R.R.P.R. Sec. 76-218:

"No gambling room shall be permitted to advertise or otherwise offer their (*sic*) facilities to the public of Puerto Rico."

Gaming Regulations, 15 R.R.P.R. Sec. 76a-1 (7), as amended on May 22, 1971:

"(7) No concessionaire, nor its agents or employees, shall advertise the gambling parlors to the public in Puerto Rico."

**Raising the Federal Question.**

At the earliest stage, the federal question was raised before the Appellee through a letter, dated February 24,

1982, which became Exhibit B of our Declaratory Judgment Complaint. (App. H, p. 1h).

The pleadings of the Declaratory Judgment Complaint filed on March 12, 1982 alleged that the gaming law provision at bar and corresponding regulations were unconstitutional as

—the total ban on casino advertising violated Plaintiff's constitutional rights protected by the First Amendment of the United States Constitution, and the Constitution of Puerto Rico.

—there was no overriding state interest substantial enough to infringe on Plaintiff's commercial free speech rights,

—it violated the United States Constitution Equal Protection Rights since other gambling activities are allowed by the State to advertise in Puerto Rico.

—due process guarantees were violated by retroactive application of a ruling and by the literal and overbroad interpretation that exceeded legislative intent, and by arbitrary, unreasonable, capricious application of the statute that yielded absurd results.

The Complaint is translated and appended hereto as proof that the federal issue was drawn in question and properly framed at the initial stage and throughout the proceedings. *Miller v. Cornwall R. Co.*, 168 U.S. 131 (1897); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974); *White v. Johnson*, 282 U.S. 367 (1930). (App. I, p. li). The federal claim and the grounds for each challenge were brought before the Commonwealth's Superior Court

with fair precision. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); *New York Central & H.R. Co. v. New York*, 186 U.S. 269. (1902).

The federal question was again brought up and thoroughly argued in our Opening Statement of the Case before the Trial Court. Our Brief specifically quoted both the Commonwealth's and United States applicable constitutional provisions. Since the jurisdictional factor is especially significant where the highest court fails to pass upon the federal question raised, as is our case, we submit a partial translation of our Memorandum of Law (App. J, p. 1j) and Reply Brief (App. K, p. 1k) to affirmatively show that the omission of the Court below was not due to lack of proper presentation. *District of Columbia Court of Appeals, et al., v. Feldman, et al.*, 460 U.S. 462 (1983); *Street v. New York*, 394 U.S. 576; *Fuller v. Oregon*, 417 U.S. 40 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1972).

Our allegations were clearly understood by the Superior Court as evidenced by the Declaratory Judgment and Opinion, specifically by Conclusion of Law No. 13 holding the cited amendments of the United States Constitution applicable to the controversy.

In addition to the trial court, the federal question was raised before the Supreme Court of Puerto Rico, both in the Appeal's *Constitutional Questions Raised* and in our Motion for Rehearing. In the latter, we cite the leading cases of this Honorable Court that bind every jurisdiction where the United States flag flies. We then traced the Commonwealth's constitutional development in these areas and pointed out to the Court that Puerto Rico's development in the regulation of advertising by a state was in the stage of *Bigelow v. Virginia*, 421 U.S. 809 (1975), and behind the stage of *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), *et als.*

Notwithstanding all our efforts, the Court below erroneously rejected this federal constitutional claim.

### Statement of the Case.

This unusual example of abridgement of expression had its origin on four fines imposed by Appellee on Appellant for the alleged violation of the provisions of the gaming law and regulations at bar. In order to provide an objective background, we shall rely on the trial court's statement of the case and findings of fact; and, if necessary to add facts absent from the declaratory judgment, we will so indicate to this Honorable Court.

Appellant is a partnership organized under the laws of Texas and doing business in Puerto Rico as Condado Holiday Inn Hotel and Sands Casino since 1975 when it was granted a franchise to operate a games of chance parlor<sup>1</sup> (findings of fact 1, 3). Appellee was created by Act No. 10 of June 18, 1970. The powers delegated to the Economic Development Administration under Act 221, *supra*, were transferred to the Tourism Company (f.f. 2).

Neither the Economic Development Administration nor Appellee supplied definitions of the scope of the prohibition on "advertising or offering the casinos to the public in Puerto Rico," or who was properly considered "the public" (f.f. 5), nor if "in Puerto Rico" included the tourists once they arrived to the island (p. 9, D.J.). Neither agency provided guidelines to its officers for the interpretation and/or application of the law and regulation

<sup>1</sup> Appellant hotel was since purchased on September 1983 by Williams Electronics Corp.; is now organized as a public corporation under the laws of Delaware as Posadas de Puerto Rico Associates, Inc.; and is doing business as Condado Plaza Hotel & Casino presently a successor with interest in this controversy.

relative to the proscribed ads. Thus, from its inception, the lack of standards placed on the total discretion of the directors of the agency and gaming department the administrative enforcement of the law and regulations (f.f. 7). The only other notice to the concessionaire of its obligations under the law and regulations was the inclusion of a condition in the franchise similar to, and as vague as, the legal requirement (f.f. 8).

Appellee enforced the law and regulations inconsistently throughout the years, allowing and proscribing similar conduct depending on the criteria of the officer in charge at the time (f.f. 9). The arbitrariness in the application of the law did not give real notice or assurance to Appellant of what was permissible or not (f.f. 10).

On May 26, 1978 Appellant's Union, Asociacion de Empleados de Casino, published an ad congratulating Appellant's management team for the opening of the former Hotel Flamboyant as the "Laguna Wing" of Appellant hotel in a Special Supplement of the newspaper, "The San Juan Star," dedicated to such an event. Appellant had no prior knowledge of, nor participation in, the publication of this ad. It was placed by the Union, paid with Union funds, was not "offering" the casino, except that the name of the Union includes the word "casino" and it used a roulette wheel in said ad. Also, in the Supplement, the press identified Mr. Ruben Causa's photograph as "Casino Director" (pp. 9, 10, D.J.).

By letter of June 1, 1978 the Gaming Director imposed a vicarious responsibility on Appellant warning Appellant's General Manager that this "ad" was a violation of the gaming law and regulations. Although the letter did not require a reply, on July 10, 1978, the first fine of \$500.00 was imposed on Appellant for not answering said letter.

With this second letter, the Gaming Director enclosed a copy of another letter addressed to him by Appellant's Casino Director, and indicated that the word "casino" had to be deleted from Appellant's letterhead because said use constituted an ad, citing his authority as final and unappealable under a paragraph of Article 9 of the law (15 L.P.R.A. Sec. 79), which at the time had been repealed.

On July 13, 1978 Appellant denied advertising the casino, and questioned—through a letter addressed to the Appellee's Executive Director—the Gaming Director's interpretation of an "ad," questioned that Appellant could be held vicariously responsible for the Union conduct, and questioned that an editorial by the press or the word "casino" in a letterhead could be construed as ads under the law.

Without awaiting for the determination of Appellee's Executive Director, the Gaming Director addressed a letter to Mr. Tom Monroe, president of Posadas de America Central S.A.,<sup>2</sup> on August 1, 1978 fining Appellant for advertising in the telephone book—a charge that was not only incorrect but that had never been notified to Appellant's management—and for the other charges before-mentioned (p. 11, D.J.).

When on August 14, 1978 Appellant's General Manager was given notice of the second fine, he telephoned Appellee's Executive Director and both agreed that the fines would not be paid until an informal hearing took place. Said agreement was notified to the Gaming Director.

In spite of this, on September 1, 1978, the Gaming Director notified a third fine because when Mr. Monroe

<sup>2</sup>This corporation owned the realty property of the hotel and casino.

answered his letter he used the letterhead with the word casino. He warned that it did not matter what use was made of the stationery, the casino reference had to be deleted and the fines paid before September 16, or the franchise would not be renewed. Appellant was notified a copy of this letter three days prior to franchise renewal and on September 14, at his request, Appellee's Executive Director held the fines in abeyance until a ruling was issued (p. 11, D.J.).

On February 16, 1979 the first ruling on advertising was adopted extending the total ban to:

"This prohibition included the use of the word 'Casino' in match boxes, lighters, envelopes, stationery for *internal* or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, chinaware, lobbys, pennants, flyers, paperweights, pencils, telephone books, directories, bulletin boards, or in any dependency of the hotel or object that *may be accessible to the public* in Puerto Rico." (Italics supplied.)

This ruling was mailed to Appellant on March 12, 1979, retroactively applying the ruling to the "violations" beforestated and modifying the fines to \$1,000 plus imposing a new fine of \$500 (because a hotel guest had handed to a casino inspector a copy of a brochure placed in his guest room, that referred to the casino) and warning Appellant that this time it must pay the fines or the franchise would not be renewed on March 18, 1979. Because of the proximity of the renewal date, Appellant was forced to waive its due process rights (p. 12, D.J.).

On July 31, 1981, Appellant's General Manager, who was also President of the Puerto Rico Hotel and Tourism

Association, conducted a press conference to protest the elimination by state action of one third of the slot machines from the casinos. As part of his protest to create conscience of the consequences of said action over tourism and to promote legislation to paralyze this phase-out—a very hot issue in Puerto Rico at the time—he conducted the reporters to the casino where he had designated the machines to be removed with a black ribbon and the message "R.I.P." The press photographed the General Manager with the slot machines and published an article on August 1, 1978 in "The San Juan Star," in which in his pure exercise of freedom of expression he criticized government action and informed the public of Puerto Rico on the ill-effects of the proposed removal (p. 13, D.J.).

As of said date, a new Gaming Director was in office, who on August 31, 1981 sent a letter to a superior officer of Appellant's General Manager informing the former that the latter had held a press conference and photographic session in violation of the gaming law and regulations, for which conduct a \$500 fine was being imposed. This time the fine was paid with a non-waiver statement that Appellant's freedom of speech rights were being abridged and a challenge of lack of legal authority to prohibit the press from photographing or editorializing on an issue of public interest (p. 13, D.J.).

The Trial Court found that, in addition to the fines, because of the administrative enforcement of the law by Appellee, the New Jersey Gaming Commission considered denying a casino license to Appellant's sister operation, Greate Bay Hotel and Casino, because upon investigating Appellant, on January 11, 1982, it found petitioner "unsuitable" to qualify under said jurisdiction's laws on the basis that in its Puerto Rico operation it had continuously violated the gaming law and regulations (p. 13, D.J.). This

recommendation forced Appellant to appear at public hearings before the Commission at great expense and effort to justify the alleged negative record in Puerto Rico.

At this point, and because of the imminent extraordinary damage that Appellee's interpretation was causing, after exhausting administrative remedies, Appellant filed on March 12, 1982 its Complaint challenging the constitutionality of Section 8 of Act 221, *supra*, and the corresponding regulations, on all three grounds herein alleged, as well as the unconstitutionality of the application by Appellee of the law and regulations (App. I, p. 1i).

On June 22, 1982, Appellee answered the Complaint essentially alleging that the prohibition was valid because it was in line with the legislative intent and that the free speech rights of Appellant were not absolute but can be restricted if related to a valid public interest. As public interest it alleged:

(a) tourists security guarantees of not being harassed by persons stranger to casino interests attracted by the publicity oriented to excessive patronizing of the casinos.

(b) government public policy of discouraging gaming in Puerto Rico, and authorizing it only as a means to attract tourism and not to promote it locally.

It further denied the equal protection challenge on grounds of similar treatment to all casino operators under Act 221 and the Commonwealth's right to establish this classification according to public policy, dissimilar from other forms of gambling. Finally, it asserted that applying the law as a total ban was valid because of the broad language of the law (pp. 2, 3, D.J.).

On November 15, 1982 the Secretary of Justice intervened.

The hearing took place on November 24 and 30, 1982.

Memoranda of Law and Reply Briefs were submitted by December 31, 1982.

On December 12, 1984, Hon. Guillermo Arbona Lago, handed his Declaratory Judgment and Opinion, providing an outstanding example of self-restraint in reaching a constitutional question. He held, that Appellee exceeded legislative intent in its interpretation, gave an overbroad scope to the prohibition producing absurd and unreasonable results (f.f. 12); had been arbitrary and capricious (f.f. 13); had lacked consistency, identification and continuity in its decisions (f.f. 14); had created intolerable instability by its erratic administrative exercise of discretion (f.f. 15); had adopted overbroad interpretations that conflict with the legislative purpose of the Games of Chance Act (f.f. 16); and that the lack of guidelines and standards leave Appellant in a state of helplessness susceptible to recurrence (f.f. 18) for which reason the administrative interpretation and application has been unconstitutional (f.f. 19), and that it was indispensable that the regulatory deficiency be cured in order to save the statutes' validity (f.f. 20).

The Opinion clearly sets forth the trial court's Salomonic juggling of interests in an effort to avoid a constitutional clash, but really signaling to the Supreme Court of Puerto Rico—in his opening statement of the *Opinion* (p. 24 of D.J.)—that the facial constitutionality challenge of the statute was, under the Constitution of Puerto Rico, for the majority of the Supreme Court Justices to judge. In order to sustain the validity of the statute, the trial Court erroneously held:

a) The classification made by the legislator of gaming in casinos versus other gambling is not suspicious or unreasonable; and, since there are no classifications within Act 221, the strict scrutiny criteria is not applicable.

b) The void for vagueness challenge under the due process clause can be overcome by the Court's provision of guidelines to direct the administrative officer's discretion, without it being necessary to strike down the validity of the statute.

Most important, the trial Court abstained from resolving our First Amendment challenge, which we consider Applicant's essential deprivation under the United States Constitution.

The trial judge then adopted substitute regulations on advertising for Appellee to follow after duly publicized by the Secretary of State according to the Law of Regulations of Puerto Rico, that we allege, and are in a position to prove, have not eliminated the recurrent violation of fundamental rights, if the Court allows the inclusion of evidence arising after the Declaratory Judgment was handed down, and therefore not before the Court below, to be brought up in our brief.

The Supreme Court of Puerto Rico ignored the trial court's recall of the exercise of their authority to strike down 15 L.P.R.A. Sec. 78 and declined to hear the appeal for want of a substantial constitutional question; thus, affirming the validity of a statute that from the inception of the controversy, we have raised violates fundamental rights from its face under both the Commonwealth's and the United States Constitution.

It is this Honorable Court's highest authority, duty and responsibility to surveil that states, including the Commonwealth of Puerto Rico, do not pass legislation repugnant to the Constitution of the People of the United States.

### **The Question is Substantial.**

The question as to the First Amendment facial challenge of a total ban on all forms of expression related to a legal, licensed, business activity is indeed a substantial one. The Court has not treated the absolute prior censorship by government of the exercise of the freedom of speech rights by a franchise holder, or if said privilege imposes valid unlimited restrictions to First Amendment freedoms.

This appeal also presents a facial challenge to one section of the Games of Chance statute of Puerto Rico because it contains no standards that give fair and adequate notice of the type of conduct prohibited, encouraging arbitrary enforcement, and subjecting the "offender" to penal sanctions when sufficient definiteness—that ordinary people can understand—is totally lacking. *Kolender v. Lawson*, 51 L.W. 4532 (1983); *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

The fatal flaw in 15 L.P.R.A. Sec. 78, 15 R.R.P.R. Sec. 76-218, and 15 R.R.P.R. Sec. 76 a-1 (7), is that they are drafted so overly broad and vague as to restrict valid speech interests that transcend even Appellant's constitutionally protected commercial speech rights, as was dramatically evidenced by the penal fine imposed on Appellant for publicly debating an issue of general public

concern, as was the elimination of slot machines from casinos in Puerto Rico by government action. *N.A.A.C.P. v. Clairborne Hardware Co.*, 50 L.W. 5122 (1982); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (defining public issues as those about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.)

When certain groups of persons are classified for specific government benefits or burdens, the Court will employ the strict scrutiny test under both the due process and equal protection guarantees, especially when a fundamental right is at stake. The Court below paid no heed to our request to subject 15 L.P.R.A. Sec. 78 to the *O'Brien* and *Central Hudson* tests. *Infra*. This question is meshed with our First Amendment, Due Process and Equal Protection challenges.

**Facial challenges are entertained, if substantial, by this Court**

This Honorable Court has resolved a facial challenge if a law reaches a substantial amount of constitutionally protected conduct. *Hoffman, supra*. A gag on all speech related to casinos, be it commercial or non-commercial, is a fundamentally protected constitutional right. *Bolger v. Young Drug Product Corp.*, 51 L.W. 4961 (1983); *Federal Communications Commission v. League of Women Voters of California*, 52 L.W. 5008 (1984).

A facial challenge has been considered substantial when a statute imposes criminal penalties under the void-for-vagueness doctrine not only because actual notice be lacking but for the lack of requirements by the legislature to govern law enforcement. *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *Winters v. New York*, 333 U.S. 507, 515 (1948).

The concern here is the continuing potential for the arbitrary suppression of First Amendment freedom of speech due to the overbreadth and vagueness of the controverted statutory section, two logically related doctrines that envelope the concept of due process of both the Fifth and Fourteenth Amendment of the Constitution of the United States. Section 8 censorship is vague in all of its possible applications and entrusts lawmaking to the moment to moment judgment of the Appellee. Thus, it does not meet constitutional standards for definiteness and clarity on its face.

**Today the Justices of the Supreme Court will apply a strict scrutiny review under the due process and the equal protection clauses to any governmental action which limit First Amendment rights.**

From the outset, we must set down the basic premise that gaming is a legal business in Puerto Rico since casinos were legalized back in 1948.

Second, it is paramount to stress that Appellant does not question the Commonwealth's authority to strictly supervise and control gaming in Puerto Rico and welcomes safeguards that guarantee the integrity of the games and reputation of honesty world-wide known. Appellant further recognizes that government regulation that has an incidental effect on First Amendment rights may be justified by overriding state interests.

The challenge is that the oversweeping effects of an overbroad prohibition that impacts First Amendment freedoms—not incidentally, but totally—cannot be justified under the *O'Brien*<sup>3</sup> test that we urged the Court below to subject 15 L.P.R.A. Sec. 78 to, and it erroneously declined, denying our facial constitutional attack.

<sup>3</sup>*United States v. O'Brien*, 391 U.S. at 376-377 (1968).

Under the O'Brien Test, the Casino Advertising Ban does not withstand strict judicial scrutiny.

First of all, we submit to this High Court that the government regulation at bar is not within the constitutional power of the Commonwealth of Puerto Rico as prior censorship of speech is repugnant to the Constitution of the United States as was repugnant to its framers subjected to such undemocratic restraints in England.

Second, we challenge that it furthers an important or substantial government interest. The discouragement of all forms of gambling—as a social evil—of all residents of Puerto Rico may be an overriding state interest, *arguendo*. But, if the discouragement of gambling were a cogent state interest to justify prohibiting the advertising of casinos, how can the state-operated lottery be allowed to advertise to the public in Puerto Rico, as the record shows? Why can cock fights and horseraces—more highly patronized by Puerto Ricans than casinos—be allowed to be advertised?

All these forms of gambling were prohibited under the 1937 Penal Code of Puerto Rico, 33 L.P.R.A. Sec. 299 *et seq.* Exceptions to the prohibited conduct were gradually made by the legislator legalizing horsetrack betting, the lottery, the casinos and cock fight betting. The excepted classifications (other than casinos) of legalized gambling are allowed to advertise to the public in Puerto Rico. Casinos are not, without any Statement of Motive for the dissimilar treatment, nor any statement whatsoever within the Act at bar that would enlighten the need for the proscription or the legitimate interest it will advance. This constitutes the basis for our equal protection challenge. Act 221 does not establish suspect classifications within its body of law. It is itself a classification of legalized gam-

bling in its totality as an exception to the general proscription of the Penal Code that encompassed all forms of gambling. Thence, its penal characteristics and criminal sanctions as felonies or misdemeanors, depending on the pertinent conduct involved. Suffice it to say, that the violation of any of the gaming regulations is a misdemeanor under the gaming law.

It is pertinent to strengthen our Fourteenth Amendment claim to point out that the Gambling Federal Devices Act, P.L. 87-840, October 18, 1962, Sec. 1955 defines:

“Gambling includes, but is not limited to, pool-selling, book-making, maintaining slot machines, roulette wheels, or dice tables, conducting lotteries, policy, ‘bolita’, or number games or selling chances therein.”

We can find no substantial government interest in protecting the public of Puerto Rico against ads or information<sup>4</sup> on the gambling parlors, but massively advertising *directly* the lottery with T.V. jingles encouraging betting.

Third, continuing with the *O'Brien* analysis, we cannot find that the government interest herein involved is *unrelated* to the suppression of free expression. Quite contrary, the whole object of 15 L.P.R.A. Sec. 78 is the abridgment of freedom of speech if in any manner it bears some relation with casinos. Regardless of content—if related to casinos—expression is censored. Regardless of truthfulness—if related to casinos—expression is banned.

Fourth, this “incidental” restriction on First Amendment protected speech can hardly be said to be no greater

<sup>4</sup>We must point out that the English translation of “advertising” is at least more defined than its counterpart “anunciar” in Spanish, which has a broader general use.

than necessary to the furtherance of the interests advanced by Appellee. We are not before reasonable time, place and manner restrictions as recently upheld in *Clark v. Community for Creative Non-Violence*, 52 L.W. 4986 (1984). Our case is more consonant with *FCC v. League of Women Voters*, *supra*, that was ruled to exceed what was necessary to protect against the risk of government interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government. People in Puerto Rico know there are casinos on the island. Whether they patronize them or not is an adult free decision-making process. The paternalistic position of government, as in *Virginia*, *supra*, has the experienced effect that many tourists come and leave the island without knowing that there are legalized casinos. Nor does silence on gaming information necessarily discourage gaming. Other more restricted means may better serve the government's aims.

Even if the Statutory Prohibition is construed to be a commercial speech restriction, it cannot withstand strict judicial scrutiny.

Speech related to business transactions, or that is only related to interests between the speaker and its audiences is considered 'commercial speech'. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

The concept of protected commercial speech has evolved since the *Pittsburgh Press*<sup>5</sup> test: if an activity is illegal, the state may prohibit its advertising.

In *Bigelow v. Virginia*, *supra*, this Honorable Court established a corollary principle: If an activity is legal, the state cannot prohibit advertising it.

<sup>5</sup>*Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights*, 413 U.S. 376 (1973).

In *Virginia*, *supra*, full protection under the First Amendment was awarded to commercial speech as long as it is *truthful information concerning lawful activity*.

This rationale was applied to the law profession in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *In Re: R.M.J.*, 50 L.W. 4185 (1982); and to commercial businesses, *Sambo's Restaurant, Inc. v. City of Ann Arbor*, 50 L.W. 2286 (1981); *Metromedia, Inc. v. City of San Diego*, 49 L.W. 4925 (1981); *Min. v. Century Camara, Inc.*, 50 L.W. 1038 (1981). And, in the 1983 *Bolger* Case, even the Postal Service regulatory scheme was not allowed to override the right to mail unsolicited advertisements for contraceptives and the right to *receive* truthful information. This case traces the development of the commercial speech trend and applies the *Central Hudson* four-prong test to the statute:

1) Is the expression constitutionally protected? For commercial speech to receive such protection, it at least must concern lawful activity and not be misleading.

2) Is the government interest substantial?

3) *If so*, does the regulation directly advance the government interest asserted?

4) Is it more extensive than necessary to serve that interest?

Should the Court below have subjected our statutory ban to this strict scrutiny, as petitioned, just as it does not withstand scrutiny under *O'Brien*, we suggest it would have failed this test.

It is not only Appellant's rights that are at stake in this case. The public of Puerto Rico, including the tourist that visits us, has protected rights to receive truthful information on gaming procedures, betting limits, gaming hours, regulatory changes, special promotions and activities, etc. *Virginia, supra*; *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977); *Procunier v. Martinez*, 416 U.S. 396 (1974).

**Statutes impermissibly proscribing protected conduct based on fundamentally mistaken premises must be set aside.**

The constitutional question is substantial enough to vacate the judgment sustaining the facial validity of 15 L.P.R.A. Sec. 78 as it deprives Appellant of fundamental constitutional rights on the impermissible premise that as a holder of a franchise granted by the Commonwealth of Puerto Rico, it enjoys a second-rate constitutional rank.

As previously stated, gaming is legal in Puerto Rico. Furthermore, it is a legal business more strictly regulated than other legal businesses, including banking. The public that patronize casinos are better protected than when they patronize other businesses. Yet, casinos continue to face an image problem. The early origins of unregulated casinos in other jurisdictions, giving way to organized crime involvement, continue to haunt and penalize the specialized professionals that under strict government scrutiny now run the industry in Puerto Rico. However, this image problem cannot taint First Amendment rights.

This High Court's constitutional law development includes a recent decision affirming a Tenth Circuit Court of Appeals ruling striking down a statute prohibiting teachers from engaging in "public homosexual activity," defined

as "advocating, soliciting, imposing, encouraging, or promoting public or private homosexual activity" as violating teacher's First Amendment rights. *Board of Education of the City of Oklahoma City v. National Gay Task Force*, 53 L.W. 4408 (1985). At least, said statute contained a clear definition of the proscribed conduct. Ours do not.

Before, in *Schad v. Borrough of Mt. Ephraim*, 49 L.W. 4597 (1981), a total ban on nude entertainment was held unconstitutional on the impermissible conception of what the majority considers "decency."

To allow the Puerto Rican statutory ban to stand above Appellant's protected rights on the impermissible premise that all gaming is a "social evil," would be to return to the *Capitol Broadcasting*<sup>6</sup> early stage when truthful advertising was allowed to be forbidden in anything considered "harmful."

Of weight for noting probable jurisdiction in our case is Justice Blackmun's reasoning in *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 52 L.W. 4875 (1984)<sup>7</sup>.

"\* \* \* Facial challenges to overly broad statutes are allowed not primarily for the litigant, but for the benefit of society—to prevent the statute from chilling First Amendment rights of other parties not before the Court."

And, on the merits, an "impermissibility" rationale that is also applicable to our case was set forth as follows:

"The law as a whole lacked 'a core of easily identifiable and constitutionally proscribable conduct

<sup>6</sup>*Capitol Broadcasting Co. v. Mitchell*, 405 U.S. 1000 (1972).

<sup>7</sup>Citing *In Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

\*\*\* The flaw in the statute is not simply that it includes within its sweep *some impermissible applications*, but that in *all of its applications*, it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." (Italics supplied.)

In our case, Appellee's contention that any and all advertising or information on casinos or gaming in Puerto Rico will have a deleterious social effect on the local people and negative effect of denial of security guarantees to the tourist is strictly speculative and cannot—under our constitutional framework—be permissible to prevail. The majority of the people gamble for entertainment in a social environment and/or to fulfill a need for "belonging" to a special club or as a status symbol. The professional gambler or the compulsive gambler, will find his way to the casinos with or without any advertising. The state is not the *pater familiae*.

In point, is the *Virginia* reasoning:

"The First Amendment which was designed to prevent the Government from suppressing information, requires us 'to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.' "

## CONCLUSION.

**For these reasons, this Honorable Court should note probable jurisdiction of this Appeal.**

Respectfully submitted,

MARIA MILAGROS SOTO  
Counsel for Appellant  
Banco Central Building  
Suite 815  
Hato Rey, P.R. 00917  
Tels. 754-1920/1717

June 4, 1985

**Proof of Service.**

All parties required to be served have been served. Three copies to be served:

Juan M. Correa Suarez  
Attorney for Appellee  
Box 4435  
Old San Juan Station  
San Juan, P. R. 00905  
Tel. 721-2400

Jose Alberto Moure  
Attorney for the Secretary of  
Justice of Puerto Rico  
Box 192  
San Juan, P. R. 00902  
Tel. 721-2900

**SWORN STATEMENT**

I, AIDA TORRES, of legal age, married, Federally Certified Translator, and a resident of San Juan, Puerto Rico, under oath state:

1. That I have been certified by the U. S. Court as a translator.

2. That I have translated the following original documents from Spanish to English which documents will be used for an Appeal filed in the U. S. Court of Appeals:

- a. Resolution of February 7, 1982.
- b. Resolution of March 7, 1982.
- c. Resolution of April 11, 1982.
- d. Notice and Opinion and Order of December 12, 1984.
- e. Writ of Appeal dated March 29, 1985.
- f. Motion for Reconsideration dated February 22, 1985.
- g. Complaint of March 12, 1982.
- h. Informative Motion dated January 14, 1985.
- i. Appeal of Supreme Court of Puerto Rico.
- j. Memorandum of Authorities of December 20, 1982 (first two and a half pages).

k. Memorandum of Reply of December 31, 1982 (one and a half pages).

3. That I certify that the above mentioned documents are a true and correct copy of their original in Spanish.

WHEREFORE, for all legal purposes I issue this sworn statement in San Juan, Puerto Rico, this 24th of May, 1985.

AIDA TORRES

Affidavit Number 6322

Sworn and subscribed to before me by Aida Torres, of the above described legal circumstances, personally known to me in San Juan, Puerto Rico, this 24th of May, 1985.

F. R. GONZALEZ  
NOTARY PUBLIC

(Seal)

**Appendix A—Resolution of February 7, 1985  
(Translation).**

TRANSLATION

IN THE

SUPREME COURT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

No. 0-85-14

APPEAL FROM THE SUPERIOR COURT, SAN JUAN SEC-  
TION.

Declaratory Judgment.

RESOLUTION

San Juan, Puerto Rico, February 7, 1985

Since we consider that the appeal does not present a substantial constitutional question, it is dismissed. Considering the writ filed as a revision, it is denied.

2a

It was agreed by the Court and certified by the General Clerk. Associate Justice Mr. Rebollo Lopez would entertain the appeal filed.

(signed)  
LADY ALFONSO DE CUMPIANO  
General Clerk

1b

**Appendix B—Opinion and Judgment, Dated December 14, 1984 (Translation).**

TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO, SAN JUAN  
SECTION

UNITED STATES OF AMERICA )  
THE PRESIDENT OF THE UNITED STATES) SS

————— ● —————  
POSADAS DE PUERTO RICO ASSOCIATION D/B/A Con-  
dado Holiday Inn,

*Plaintiff,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant.*

Civil No. 82-1508 (908)  
————— ● —————

Re: Declaratory Judgment.

NOTICE OF JUDGMENT

Maria Milagros Soto, Esq., Banco Central Bldg., Office  
1115 Hato Rey, Puerto Rico 00917.

2b

Juan A. Correa Suarez, Esq., Box 4435, Old San Juan  
Sta., P.R. 00905

Jose Alberto Moure, Esq., Box 192, San Juan, Puerto  
Rico 00902

The subscribing Clerk informs you that this Court has  
issued a judgment in the case of reference on December  
12, 1984, which has been duly registered and filed in the  
records of this matter, where you will be able to find the  
details of the terms of same.

And, since you are or have represented the party prej-  
udiced by this judgment, which may be appealed, I send  
you this notice, having filed copy of same in the record of  
this case on December 14, 1984.

San Juan, P.R., December 14, 1984.

(Signed)

By: G. Hernandez  
Asst. Clerk

DORIS MORALES  
Clerk

3b

TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO  
SAN JUAN SECTION

POSADAS DE PUERTO RICO ASSOCIATION D/B/A Con-  
dado Holiday Inn Hotel,

*Plaintiff,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant.*

Civil No. 82-1508 (908)

Re: Declaratory Judgment.

OPINION AND JUDGMENT

On March 12, 1982 plaintiff, doing business as Con-  
dado Holiday Inn Hotel and Sands Casino, filed a lawsuit  
for Declaratory Judgment against the Puerto Rico  
Tourism Company wherein it questions the unconstitu-  
tionality of Section 8 of Act 221 of May 25, 1948, as  
amended, (15 L.P.R.A. Sec. 78) and Sections 76-218 and  
76a-1(7) of the Gaming Regulations enacted pursuant

thereto (15 R.R.P.R.). It also argues the unconstitutionality of defendant's implementation of said law and regulation. He duly notified the Secretary of Justice and it has appeared to defend same.

Plaintiff alleges that since 1975 it has a franchise to operate a gaming room in Puerto Rico and that on February 16, 1979 defendant adopted a literal interpretation of the aforementioned section of the law which it applied to facts which occurred before it was published, causing immediate damages consisting of retroactive administrative fines totalling \$1,500.00 plus \$500.00 of a prospective fine because it exercised its freedom of speech rights in a press conference, and mediate irreparable damages consisting in the possible denial of a license to operate a Casino in Atlantic City as a result of an investigation by the Department of Gaming Enforcement of that jurisdiction, which revealed that plaintiff had violated the Gaming Law and Rules in Puerto Rico.

Regarding the unconstitutionality of the law and the regulation, plaintiff alleged that the absolute prohibition of advertising the gaming rooms in Puerto Rico:

"violates the freedom of speech guaranteed by our Constitution and that of the United States without the existence of any proportional substantial public interest to limit its freedom to commercial expression.

"violates the equal protection of the law guaranteed by both Constitutions since other games of chance, such as the Lottery, horse racing and cock-fighting are allowed to advertise to the public in Puerto Rico.

"violates due process of law because of its broad and vague drafting, without any guidelines or standards for its interpretation, thus allowing that de-

fendant's application of same exceed legislative intent, be unreasonable and susceptible to continue being so."

Regarding the unconstitutionality of the administrative application, plaintiff alleged that defendant's actions were arbitrary, capricious, inconsistent and unjust and violated due process of law because of its retroactive application to plaintiff without it being possible to know the conduct proscribed; and, also, because the prospective broad interpretation exceeded the scope of the law.

On June 22, 1982 defendant answered the complaint arguing that the delegation of powers to regulate the prohibition to advertise was valid because it was the express will of the legislator and that plaintiff's freedom of expression was not violated since this right is not absolute but has its legislative limitations when they have a direct relation to a valid public interest. It defined as public interest:

"The guarantee of security to the tourist cannot be damaged by persons who are not interested in casinos, attracted by publicity oriented towards uncontrolled sponsorship, motivated the legislator to expressly prohibit the advertising of gaming rooms.

"The prohibition is intimately related to the governmental public policy of discouraging games of chance in Puerto Rico and authorizing it only as a measure to promote tourism to the Island and not promote it locally."

It denied that the application of the law violated the equal protection of the law since it applied equally to all gaming rooms, alleging that the meaning of the clause implies equality in similar circumstances, and that said guarantee did not deprive the states of their right and

power to classify the objectives or public policy of the Legislature. Lastly, it alleged that the regulation does not exceed the legislative provision since it is not irrelevant to the objective which the law pursues and allows a broad interpretation, having defendant interpreted the legal provision in a practical and objective manner by prohibiting all type and manner of advertising in Puerto Rico, since this was what the legislator wanted.

The Secretary of Justice intervened in the case on November 15, 1982.

The hearing on the merits was held during November 24 and 30, 1982, and Attorney Juan Correa Suarez appeared representing defendant, Attorneys Guillermo Garau Diaz and Jose Alberto Moure representing the Secretary of Justice and Attorney Maria Milagros Soto representing plaintiff.

At the beginning of the hearing, the parties met and after examining the lengthy proposed documentation of each party, they stipulated the following documentary evidence:

- I. Joint Exhibit A: Gaming Regulations.
- II. Exhibit 1 of plaintiff: Special Supplement of the San Juan Star of May 26, 1978.

Exhibit 2: Letter of June 1, 1978 of Victor Molina admonishing Hugh A. Andrews for the advertisement published by the Association of Casino Employees in the Supplement.

Exhibit 3: Letter of June 21, 1978 of Victor Molina authorizing the taking of the photographs in the casino.

Exhibit 4: Letter of July 10, 1978 of Molina imposing a fine on Andrews for not answering his previous letter, accompanied by two exhibits.

Exhibit 5: Letter of July 13, 1978 from Hugh Andrews to Doel Garcia in which he questioned the interpretation and denied the violation.

Exhibit 6: Letter of August 6, 1978 from Molina to Tom Monroe, informing Andrew's violation and the fine imposed.

Exhibit 7: Letter of August 14, 1978 from Hugh Andrews to Doel Garcia thanking him for postponing the fine until they met.

Exhibit 8: Letter of September 1, 1978 from Molina fining Monroe because he used letterhead paper when answering.

Exhibit 9: Letter of September 13, 1978 from Andrews to Molina stating he was not aware of the administrative guidelines and requesting the Board of Directors for an interpretative ruling.

Exhibit 10: Letter from Molina to the Treasury dated September 14, 1978, authorizing the license.

Exhibit 11: Letter of February 20, 1979 from Molina to Andrews accompanying the guidelines, fining him for a magazine delivered by a guest to the government inspector and reactivating the previous fines.

Exhibit 12: Administrative Ruling of February 16, 1979 regarding the interpretation of the prohibition of advertisements.

Exhibit 13: Letter from Francisco Nolla to Andrews of August 31, 1981 fining him for press conference and photographic session.

Exhibit 14: Memo of May 8, 1981 from Nolla to the franchisees ratifying Molina's policy regarding advertising in the gaming rooms.

Exhibit 15: Letter of June 12, 1981 from Roberta Ezratty requesting permission to advertise the casino in "Leisureguide".

Exhibit 16: Letter of July 10, 1981 signed by Nolla, authorizing the advertisement of the Casino in the hotel rooms.

Exhibit 17: Letter of September 18, 1981 from Pat Volonino to the Treasury, paying the fine under protest in order to renew the license.

Exhibit 18: Letter of February 9, 1982 from Nolla, authorizing menus with the word "casino".

Exhibit 19: Letter of February 16, 1982 from Pat Volonino to Nolla on hotel letterhead.

Exhibit 20: Letter of January 29, 1982 from Nolla to Ruben Causa regarding the photos.

Exhibit 21: Letter of February 24, 1982 from Attorney Maria Milagros Soto to Attorney Frances Rios de Moran, requesting a more reasonable interpretation and regarding the need to file lawsuit.

Exhibit 22: Letter of March 3, 1982 from Roberta Ezratty to Nolla requesting permission to use the "Sands" logo in the "Innside Puerto Rico" Magazine.

Exhibit 23: Letter of March 8, 1982 from Nolla denying permission.

Exhibit 24: Letters of April 27 and 29, 1982 from Volonino to Nolla requesting permission to photograph Alba Nydia Diaz in the Casino for an article in the "Vea" magazine and from Nolla authorizing it despite the fact it is for distribution in Puerto Rico.

Exhibit 25: Letter of July 29, 1982 from Ezratty to Nolla requesting permission to use the Sands Casino logo.

Exhibit 26: Innside Puerto Rico Magazine.

Exhibit 27: Leisureguide Magazine.

Exhibit 28: Article of September 21, 1982.

Exhibit 29: New Jersey Gaming Commission Report.

Exhibit 30: Selected Statistics published by defendant.

Exhibit 31: Lottery cassettes and jingles.

Exhibit 32: "A Strategic Plan for the Development of Tourism to Puerto Rico" by Economic Research Assoc.

III. Exhibit 1 of defendant: Letter to Ruben Causa of April 7, 1980, authorizing photo for "Status" magazine in Argentina.

Exhibit 2: Letter of April 8, 1980 from Nolla to Causa authorizing photos.

Exhibit 3: Letters of July 16 and 29, 1981 to Nolla from Ezratty requesting permission to advertise in cruiseships and from Nolla authorizing it.

Exhibit 4: Letter of August 27, 1981 from Attorney Soto to Pedro de Aldrey requesting permission to identify the casino with the trade name of "Sands" for marketing purposes.

Exhibit 5: Letter of September 30, 1981 from Pedro de Aldrey to Attorney Soto authorizing the use of Sands Casino, provided it was promoted as a dependency of the hotel and not separately.

Exhibit 6: Letter of January 4, 1982 from Ezratty to Salas.

Exhibit 7: Letters of December 28, 1981 and January 20, 1982 from Ezratty to Salas and from Nolla to Ezratty regarding authorization of photos and promotion.

Exhibit 8: Letter of January 26, 1982 to Nolla from Volonino requesting prior approval for ad.

Exhibit 9: Letter of January 28, 1982 from Nolla to Volonino regarding photos.

Exhibit 10: Letters of January 28 and 29, 1982 from Ezratty to Nolla and from Nolla to Causa requesting and authorizing permission to take photos.

Exhibit 11: Letter of February 29, 1982 from Nolla to Ezratty regarding casino photograph.

Exhibit 12: Letter of March 3, 1982 from Nolla to Volonino authorizing the new lay out of the Casino.

Exhibit 13: Letter of May 5, 1982 from Nolla to Causa authorizing photograph for documentary.

Exhibit 14: Letters of July 2 and 9, 1982.

Exhibit 15: Letter of June 3, 1982 from Attorney Soto requesting written confirmation to use the trade name of "Sands Casino" and accompanying a brochure with that name.

Exhibit 16: Letter of July 20, 1982 from Nolla to Attorney Soto confirming the authorization.

Exhibit 17: Letter of November 17, 1982.

Exhibit 18: Letter of May 8, 1982 from Nolla ratifying Molina's position regarding advertisements.

Exhibit 19: Letters of October 14 and 19, 1982.

As witnesses for plaintiff appeared Messrs. Pasquale Volonino and Hugh A. Andrews, President and General Manager of the hotel. Mr. Miguel Domenech, Executive

Director of the Hotel and Tourism Association of Puerto Rico and Mr. Jose Franco, President of Joe Franco & Associates, the advertising agency of the Lottery of Puerto Rico, also testified.

Defendant only presented the testimony of Mr. Francisco Nolla Duran, Gaming Director of the Tourism Company.

Mr. Volonino traced the history of defendant's practices with respect to authorization or denial of permission related to the promotion of the casino in Puerto Rico and the mainland. The witness, before working for plaintiff, was Manager of the Helio Isla Hotel & Casino. On the date of the hearing he had resigned his position as Comptroller of Plaintiff's casino and was acting as Administrator of the law firm of Thompson & Mitchell in St. Louis, Mo.

The witness testified that around 1974-1975 the promotion of games of chance within the premises of the hotel was permitted. Also permitted were advertisements in magazines distributed within the hotel and even the promotion of the hotel as Helio Isla Hotel & Casino in napkins, matchboxes, stirrers and billboards of the hotel to announce the superstars that they usually presented. Nobody from Tourism ever intervened or fined the hotel. He personally was not aware that it was forbidden to advertise in Puerto Rico until 1976, when the hotel was reopened by Posadas. The witness explained that he conducted an investigation when he received the complaint from Mr. Molina regarding the advertisement which the Association of Casino Employees placed in the Special Supplement of "The San Juan Star", since they were being made responsible and nobody from the hotel had participated in the Union's spontaneous decision.

To demonstrate the unconstitutionality of the administrative application of the law and the regulation, and

therefore the unconstitutionality of Section 8 of the Law and the regulatory sections adopted pursuant to same, the witness—corroborated by the testimony of Mr. Andrews and the witness for defendant—brought for our consideration four fines which were imposed, without this being construed that the administrative action of fining this subject to judicial review in these proceedings.

The following data extracted from the evidence presented by both parties is fundamental to dilucidate the controversies that we will summarize hereinafter.

On May 15, 1948 the legislator authorized in Puerto Rico the games of chance of roulette, dice, cards and bingo, proscribed in the Penal Code of Puerto Rico of 1937, Art. 299 *et seq.*, exclusively in gaming rooms operated through franchises granted by the Secretary of the Treasury. Said law conferred ample regulatory and fiscalization faculties to the Administrator of the Economic Development Administration. In its statement of public policy, in Section 1 of the law, the Puerto Rican legislator stated that the purpose of the law was to:

1. Contribute to the promotion of tourism through the authorization of certain games of chance was styled in certain entertainment places of the great touristic centers of the world;
2. Assign the regulation or fiscalization of these games by the government in order to grant the tourist the greatest possible guarantees.
3. Grant the Secretary of the Treasury of Puerto Rico an additional source of income.

Without stating any additional legislative intention, the legislator provided in Section 8 in question here that:

"It is forbidden for any gaming room to advertise or (SIC) offer itself to the public in Puerto Rico in any manner whatsoever, or to admit persons under 18 years of age."

This law is dated before the Constitution of Puerto Rico.

There is no legislative history since there is no Diary of Sessions on that date nor any Reports of the Commission and the Minutes regarding the approval of H.B. 667 are limited to a discussion regarding the desirability of the law to promote tourism.

It wasn't until 1957 when the Economic Development Administration adopted a Regulation which contained two provisions regarding the prohibition. Section 76-218 (15 R.R.P.R.) copied the law textually, but omitted any references to "in Puerto Rico". However, Section 76a-1(7) provided:

"Concessionaires will not advertise the gaming rooms in Puerto Rico in *newspapers, magazines, radios* or any other manner in which the announcement will reach the public directly." (emphasis added)

In 1971 defendant amended this last section according to the procedure established in Article 22 of its organic law, Act No. 10 of June 18, 1970 (23 L.P.R.A., Sec. 671 *et seq.*) eliminating the scant regulatory parameters, which more contemporaneously with the approval of the law limited the interpretation of "announcements" to the concept of publicity hired and paid in the communication media addressed directly to the public of Puerto Rico, by adopting the following text:

"No concessionaire, or agent or employee of same may advertise the gaming parlors to the public in Puerto Rico . . ."

Defendant never defined (1) what constituted announcing the rooms, (2) who was considered "the public"; (3) nor if "in Puerto Rico" included the tourist once he arrived to the Island. We infer from the new wording that the intention was to broaden the concessionaire's responsibility to include its agents and employees and that the purpose was also to broaden the prohibition by textually copying the broad letter of the law. From the evidence presented we see that the implementation of the regulation depended on the discretion of who occupied the position of Gaming Director at a given moment. This inconsistency placed, and still does place, plaintiff and any other concessionaire in an uncertain position with respect to the conduct proscribed.

On May 26, 1978 *The San Juan Star* dedicated a Special Supplement to the Condado Holiday Inn Hotel and its personnel due to the inauguration of the "Laguna Wing," the previous Hotel Flamboyant which at the date was closed and was reopened as part of the expansion of plaintiff's operations. The Casino Employees Association placed an advertisement in which it congratulated management. Plaintiff had no knowledge of, nor participated in, the publication of said announcement. From the evidence it is proved that it was due to the initiative of the Union and paid from the Union funds. Notwithstanding the above, on June 1, 1978 the then Gaming Director, Mr. Victor Molina, sent a written admonition to the General Manager of Plaintiff for violating the law and regulation because of the announcement placed\* by its employees and because

\*A generic drawing of a roulette and the name of Association of Casino Employees of the Condado Holiday Inn were used in said ad.

of the publication of the photo of Mr. Ruben Causa, identified by the press as Director of the Casino (Exhibit 1 and 2). This communication required no reply.

On July 10, 1978 Mr. Molina imposed the first fine on plaintiff for \$500.00 for not having answered his letter of June 1, 1978, warning him that if the violation was repeated he would suspend or revoke its gaming license. This time he included a copy of a letter sent by Mr. Causa, indicating that the use of the word "casino" in plaintiff's letterhead constituted an ad and had to be eliminated. In his letter the Director based his faculties on Section 9 of the Law which at that time was derogated, representing erroneously that his determination was final and unappealable (Exhibit 4).

Plaintiff's manager communicated in writing with the Executive Director of Tourism on July 13, 1978 denying that the hotel had advertised or offered its gaming room to the public of Puerto Rico and questioning the interpretation that an announcement from the Union be vicariously attributed to him, and that an editorial written by the press and the designation of "Casino" in its letterhead constitute an advertisement pursuant to the law. He requested a confrontation of these charges as soon as possible. (Exhibit 5).

Without awaiting to dilucidate the charges, on August 1, 1978 Mr. Molina wrote to the president of Posadas de America Central, Tom Monroe, notifying him the fine with respect to an advertisement in the telephone book, a charge which was not notified to plaintiff and which was incorrect; and for the aforementioned ads. (Exhibit 6). When Mr. Andrews (Manager of Plaintiff) found out on August 14, 1978, he communicated with Mr. Doel Garcia on the telephone and they agreed that the fine would not be paid until they met. This agreement was confirmed in writing with a copy to Mr. Molina (Exhibit 7).

Even so, on September 1, 1978 Mr. Molina again communicated with Mr. Monroe, notifying the imposition of a new fine because in answering its letter on August 24, 1978 Mr. Monroe used the letterhead which made reference to the casino (Exhibit 8). He informed that the use which was given to the paper didn't matter, that the word "casino" had to be eliminated and the fines paid before September 16, 1978, when the casino's franchise expired, or otherwise it would not be renewed. Mr. Andrews did not receive a copy of that letter until three days before the term expired and that same day he was able to get a meeting with the Director of Tourism, agreeing to postpone the determination as to whether he had violated the law until defendant clearly and precisely defined what constituted an advertisement (Exhibit 9). On September 14, 1978 Mr. Molina authorized the issuance of the franchise while the matter was clarified (Exhibit 10).

It wasn't until February 16, 1979 that defendant, for the first time, defined its interpretation of what constituted an advertisement. The prohibition to advertise adopted by defendant was absolute, establishing:

"This prohibition includes the use of the word "casino" in matchboxes, lighters, envelopes, internal and/or external letterheads, invoices, menus, napkins, brochures, elevators, glasses, plateware, lobbies, banners, flyers, paper holders, pencils, telephone book, directories, billboards, or in any dependency of the hotel or object which may be accessible to the public in Puerto Rico."

Mr. Molina accompanied this guideline with his letter of March 12, 1979 to plaintiff together with another, in which he again fined plaintiff for "an advertisement" in a publication which is placed in the guest rooms of the hotel,

where the casino was mentioned. The magazine was given to a government inspector by a guest of the hotel. In addition to the \$500 fine, plaintiff's two previous pending fines were reactivated, for a total of \$1,500 to be paid within ten days or else the casino license would not be renewed on March 18, 1979 (Exhibits 11 and 12). Faced with the proximity of the expiration date of the license, which had to be renewed every three months, and having been informed that the decision was not appealable, plaintiff paid the fines. It should be noted that the paragraph of the law invoked by the Director was derogated in 1976. Reintroduced in 1980, prior to the facts, it did not prohibit judicial review. Therefore, plaintiff was denied his right to review.<sup>1</sup>

The controversy regarding the interpretation of this section of the law seemed to conclude until it was resurrected on July 31, 1981. On that date Mr. Andrews, Manager of plaintiff, who was also President of the Hotel and Tourism Association of Puerto Rico, called a press conference in his office to protest governmental action of eliminating one third of the slot machines located in the casinos. As part of his protest and to raise consciousness about the consequences of said action on tourism and to promote legislation which would paralyze the elimination of said machines, which was a highly controversial issue in Puerto Rico, with ample newspaper coverage for weeks, Mr. Andrews placed a black ribbon on the slot machines that would be removed from the casino of his hotel with the message "R.I.P.". At the conclusion of his conference, he conducted the reporters to the casino, at a time when it was closed to the public, to show them the number of machines which would be removed, thereby illustrating how the casino and the economy of Puerto Rico would be

<sup>1</sup>Since the writ of review was not timely filed, these incidents should only be weighed to illustrate to the Court the arbitrariness of the law, retroactively and prospectively.

affected, from his point of view. The press took photographs of same and on August 1 published an article in *The San Juan Star* in which the speaker appeared in front of a slot machine. The article did not promote the hotel's gaming room, it only criticized, in the pure exercise of his freedom of speech, to the people of Puerto Rico, about the projected removal of the machines and the effect of said action (Addendum to Exhibit 13).

On that date there was a new Gaming Director, Mr. Francisco Nolla, who proceeded, on August 31, 1981, to send a communication to Mr. Luis F. Ponce, supervisor of Plaintiff's manager, informing him that he had sponsored a press conference and a photographic session at the hotel's facilities in violation of the Gaming Law and Regulations, whereby he was fined another \$500. In order to obtain the renewal of its license, plaintiff was forced to pay the fine under protest because he understood that he was being restricted in its constitutional right to free expression and because it was the press who took the photographs, without there being any legal basis to prohibit same (Exhibit 17).

In addition to the fines, the evidence shows that the administrative action caused the New Jersey Gaming Commission to consider denying a petition for a franchise to operate the Greate Bay Hotel and Casino to plaintiff's parent company, Inns of America, whereby as a result of the investigation that said State conducted before granting said license, a report was issued on January 11, 1982 recommending that the petition be denied since petitioner was considered unsuitable to qualify for a license in that jurisdiction because among other factors, it had continuously violated the Gaming Laws and Regulations in its operation in Puerto Rico (Exhibit 29). Faced with such im-

minent damage, and after trying in vain to obtain an administrative change of the ruling, plaintiff filed in this court a complaint seeking Declaratory Judgment.

In our appreciation, the evidence presented by defendant —far from demonstrating the reasonableness of its interpretation—reinforces plaintiff's evidence that the administrative agency has been inconsistent and arbitrary in its application of the law and regulations.

On one hand, we have evidence that when Mr. Nolla occupied his position, he ratified in writing the interpretative norm of Mr. Molina (Exhibit 14), and a year later fined Mr. Andrews for the press conference and photographic session.

The new Director, Mr. Nolla, stated in court that he considers said administrative directive invalid and that he did not adhere to same nor is strictly observing it at the moment of the trial. To prove his flexibility and lack of arbitrariness, he gave us examples of authorizations contrary to what was expressed by Mr. Pedro de Aldrey in the directive in controversy. In his opinion, the directive is not valid because it was issued by the sub-director and not by Mr. Doel Garcia, and he considers it an amendment to the Regulations. He now follows the letter of the law which he understands is more flexible. He admitted that the previous directive has not officially been voided and that it was approved by the Board of Directors, the body which appoints him. However, Mr. Nolla does not recognize it as valid at present. Mr. Nolla stated that he allows publicity inside the hotel because the visitor is a guest, he is no longer "the public" according to his interpretation and the scope of the law, and that said information is an orientation to the tourist. This permission includes publicity in elevators, calling cards, notices in the internal directories of the hotel, menus, matchboxes, napkins and letterheads in internal correspondence. He does not consider the word

"casino" used in the letterhead an "advertisement" because it is directed to clients and the purpose is not to announce itself but to identify itself. He has allowed the use of the name of the casino in activities in the interior of same. The documentary evidence sustains his deviation from the guidelines adopted as of 1982. But, he admitted that he never informed the interpretative change of the norm in writing to the casinos operating in Puerto Rico to which said norms applies.

The witness sustained in court that he fined plaintiff for having allowed the taking of photographs without the Company's permission, sustaining that pursuant to the regulations the press cannot photograph the casinos and slot machines without prior permission from said governmental instrumentality. If a newspaper from the City, said the witness, wants to write an article and photograph the casino, and the article is not previously authorized, it would violate the law pursuant to the regulation. He stated that once a gaming room begins to operate, no photographs are permitted. If it is outside schedule, he stated security reasons for requesting the notice. He stated that a citizen cannot enter a casino with his camera and if he does, the gaming inspector must confiscate it.

The evidence points out that, even though the present interpretation of the witness is more in agreement with the legislative purpose than that of the previous Director, plaintiff and all the casinos which operate in Puerto Rico are again in an interpretative limbo if the written norm is susceptible to changes and modifications pursuant to the discretion of the person who occupies the Gaming Director's chair at any given moment. We saw, and we in fact take judicial notice and it was clarified in court, that while Mr. Molina directed the Gaming office, the casinos had to remain hidden or out of sight within the hotel. No internal directions were permitted within the hotel to reveal its location. If any wall of the casino were made of glass it had to be covered with curtains and a screen had to be

placed so that when the casino doors opened it could not be seen from the hall.

Also, for purposes of analyzing the public policy which the law pursues, the statements of Mr. Nolla to the effect that pursuant to Act No. 10 the Board of Directors, with the approval of the Legislature is empowered to establish the policy regarding games of chance, are pertinent. He stated that the directors are appointed by the Honorable Governor of Puerto Rico. Any amendment to the regulations and policies of games of chance must first have his approval before it is submitted to the Legislative Assembly. He admitted that the Governor's policy is to discourage games of chance and eliminate the slot machines. He appeared at the public hearings to testify against the slot machines. The Governor of Puerto Rico vetoed two bills of law submitted by the opposing party to extend the permanency of the machines and it was finally approved through consensus in a third project. Despite the aforementioned policy, the witness admitted that in 1982 the Governor submitted to the Legislative Assembly some amendments increasing the minimum and maximum limits of bets at the dice, roulette and black jack tables.

The witness stated that although the company has not undertaken a study about the social impact of the slot machines and how many Puerto Ricans play at the casinos, on the basis of the reports from its inspectors he calculates that about 5% of the persons who play at the casino are residents of Puerto Rico.

The little legislative history that exists on Act No. 1 of July 30, 1982 was enlarged by witness Miguel Domenech, Executive Director of the Hotel and Tourism Association of Puerto Rico, who actively participated in the legislative and executive phase of the three bills of law to extend the term of the slot machines. The witness stated that neither H.B. 176 nor H.B. 433, which were vetoed, contained the legislative intention of discouraging the games of chance.

(Appendixes 3 and 4 of Plaintiff's Memorandum in Opposition). And that both projects had the support of the majority of the representatives of both political parties according to the count of votes which was submitted to us. The Legislature tried to override the Executive's veto to H.B. 176 without being able to obtain the required two thirds vote. All of this was also widely debated by the press.

We were submitted a copy of the Sessions Diary of February 10, 1982, Vol. XXXVI, No. 15 regarding the extensive debate in the Senate of Puerto Rico as Appendix 5 to Plaintiff's Memorandum in Opposition. An examination of the statements of the legislators reflects that the Puerto Rican legislator does not share the policy of discouraging the use of the slot machines and games of chance which the Hon. Governor of Puerto Rico indicated in his express veto (Appendix 3).

Mr. Domenech stated that to achieve the paralization of the elimination of the slot machines, by a consensus of the two branches, the conditions of the Executive were accepted and the administration's bill S. B. 663, submitted in an extraordinary session, was approved.

The statistics compiled and published by defendant itself (Plaintiff's Exhibit 30) reflect that during fiscal year 1980-81 2.5 million visitors arrived at our airport. Of these only 537,515 stayed in hotels in Puerto Rico—one fifth. Of these, about 60 to 70% stayed in hotels with casino. The rest of the visitors are persons in transit to other destinations (stop-overs) or stay in condominiums, guest houses, with family members or friends. Over 500,000 visitors arrived in cruiseships on that date and nearly 90,000 had conventions on the Island. The legislative prohibition of not announcing the casinos in Puerto Rico has prevented the casinos from reaching millions of tourists who arrive in Puerto Rico, since they cannot place announcements in the mass means of communication, in the docks nor in the airports, even though they may be addressed to the tourist and not the local resident. This

witness and Mr. Andrews testified that the market in Puerto Rico was really secondary but that the limitation affects the promotion to the tourist since there are no economic means which would allow them to announce in the markets which they would have access to if they were allowed to announce in the areas of tourist transit.

Mr. Domenech represented that the hotels confront an economic crisis. Some have closed, and new hotels have not been established in a long time. Of the hotels with casino only the Caribe Hilton operates with a profit and that is because it is owned by the government, thus Hilton has no capital debt and enjoys tax exemption for which the other hotels don't qualify since the Industrial Incentives Law was amended. The Condado Holiday Inn was operating marginally, stated the witness, and the rest were losing money. He added that the tourism industry is the third economic sector offering employment to thousands of Puerto Ricans, but that the problems which the industry confronts have no short-term solutions, other than the promotion of the casinos, according to a study conducted by defendant (Plaintiff's Exhibit 31). Other data supplied by him demonstrates that tourism has been decreasing during the last years, affecting thousands of workers in Puerto Rico.

Finally, the jingles which the Lottery was using in its promotional television campaign were presented in Court together with the testimony of Mr. Franco relating to the fact that since the government contracted the publicity of lottery game, the sale of tickets has increased from four to six series.

We were supplied with written texts and recordings of the various advertisements of the Lottery of Puerto Rico. We were requested to take judicial notice that the horse races are not only announced, but transmitted on race days, and that the cockfighting law does not impose any limitation on advertising. We did so.

The parties were granted until the 20th of December of 1982 to submit simultaneous briefs and until December 31

to reply. Plaintiff submitted its Memorandum of Authorities on time. The brief from the Secretary of Justice was received on December 24 with our approval. Defendant did not file a separate brief, but subscribed the brief of the Secretary of Justice by motion of December 29, 1982. Plaintiff filed its Reply on December 31, 1982, and the case was submitted since neither defendant nor the Secretary replied.

After the hearing through two motions filed by plaintiff, new evidence relating to advertisements published by the Lottery in the press and by the Condado Beach Hotel, which advertised in the "Que Pasa in Puerto Rico", an official tourism guide of defendant, were presented for judicial knowledge pursuant to Rule 11 of the Rules Evidence.

Regarding the allegations of both parties, amended by the evidence presented, the following controversies arise which we must resolve:

1. If Section 8 of Act 221 of May 15, 1948, as amended, is unconstitutional because it violates the right to freedom of expression, in general; and the right to commercial expression, in particular.
2. If Section 8 of the aforementioned law is unconstitutional because it violates the clause of equal protection of the law.
3. If the aforementioned section 8 is unconstitutional because it is excessive and broad and also ambiguous because it lacks reasonable guidelines or parameters in violation to the guarantee of due process of law.
4. If the total and previous ban to the publication of any advertisement of the gaming rooms, together with the broadness and vagueness of the statute which is not supplemented by the Regulation adopted by defendant, and

without other concessionaires of licenses of games of chance being prohibited to advertise in Puerto Rico, warrants strict judicial scrutiny since it violates constitutional rights.

5. If the State's interests exceeds the rigours of the constitutional clause in controversy by interfering with the fundamental right to freedom of expression.

6. If the administrative directive of February 16, 1979 is valid.

7. If the administrative action, based on the gaming law and regulation, has proven to be arbitrary, capricious, erroneous and unreasonable, producing absurd and unconstitutional results, susceptible of continuing to be so because of the lack of any clear standards on the scope of the prohibition to freedom of expression regarding gaming rooms in Puerto Rico.

### FINDINGS OF FACT

The facts which give basis to plaintiff's cause of action, in our appreciation, were not controverted and may be resumed as follows:

1. Posadas de Puerto Rico Associates is a partnership organized under the laws of the State of Texas doing business in Puerto Rico under the trade name of Condado Holiday Inn Hotel and Sands Casino.

2. The Tourism Company of Puerto Rico was created by Act No. 10 of June 18, 1970, which transferred to it the powers which the Economic Development Administration had pursuant to Law No. 221 of May 25, 1948.

3. Since 1975 plaintiff is the concessionaire of a franchise to operate a gaming room in Puerto Rico issued by the Department of the Treasury.

4. The Gaming Regulation was promulgated in 1957, and contained only two provisions regarding the prohibition to announce the gaming rooms in Puerto Rico, which we will discuss under our conclusions of law.

5. Neither the Economic Development Administration nor the Tourism Company offered a definition of what constituted "announcing or offering to the public in Puerto Rico", nor of what "public" was properly considered to mean.

6. Neither the Administration nor defendant supplied guidelines to their officers regarding the interpretation and/or application of the law and regulations relating to the proscribed advertisements.

7. From the time it was approved, administrative application was at the discretion of the Administration, and later on of defendant, depending on the sound criteria of the head of the organism and the Gaming Director.

8. Aside from the letter of the law and the regulation, the only publication to the concessionaire regarding its obligation on the subject was the inclusion in the conditions of the franchise of a clause similar to the legal one.

9. Defendant applied the law and regulation inconsistently and through the years allowed and prohibited similar conduct, depending on the criteria of the official at a given time.

10. The arbitrariness in applying the law never allowed plaintiff to truly know or be assured of what was or was not permissible.

11. On February 16, 1979, and for the first time, a ruling was adopted which informed the concessionaire of a franchise of the conduct which defendant prohibited.

12. The scope of the administrative prohibition is excessively broad and surpasses the legislative intent producing absurd and unreasonable results, such as prohibiting the casinos from identifying themselves even within the hotels and requesting that the entrance to the casinos be covered with a screen to prevent its being seen from the outside.

13. The administrative application to plaintiff was exceedingly arbitrary and capricious. Not only was the recently adopted administrative norm, which until that moment had been unknown by plaintiff, applied retroactively, but the determination that the four incidents for which it was fined had violated the law and regulation is a true example of defendant's irrational interpretation, without entering into their merits since this lies outside our jurisdiction.

14. We find serious faults of identification and definition, of reasonable implementation and decisional continuity in the administrative application.

15. The erratic administrative discretion creates an intolerable instability to hotels with casino.

16. The excessive administrative interpretation conflicts with the legislative intent of legalizing gambling to pro-

mote tourism as is the custom in the great touristic centers of the world. From the evidence it is apparent that defendant has adopted criteria which does not promote tourism in Puerto Rico, such as seizing cameras from the tourists to prevent their taking photographs of the casino. We also take judicial knowledge that the gentleman tourist is also required to wear a jacket<sup>2</sup>—which rather, and as a measure for its conservation, looks more like a circus or carnival costume—as a requirement to enter into the gaming rooms after a certain hour in the afternoon.

17. The administrative interpretation limits the promotion of the casinos to outside the island, without regard to whether the promotional intention is addressed to the tourist who is visiting Puerto Rico or is in transit.

18. The absence of any reasonable guidelines or parameters which will define the scope of the law leaves plaintiff, and all other concessionaires, defenseless, susceptible to a recurrence of the uncertainty of how new incumbents will apply the law.

19. The administrative interpretation and application has been capricious, arbitrary, erroneous and unreasonable, and has produced absurd results which are contrary to law, and thus suffer from the vice of unconstitutionality.

20. It is necessary that we override the regulatory deficiency to save the constitutionality of the statute.

<sup>2</sup>Since we became aware of the discriminatory practices that impose on the male sex some requirements not exacted from the female sex, we have referred to this practice in our findings of facts, conclusions of law and opinion.

Even though this does not present a harmful discrimination for sex reasons, its implementation does discriminate unjustly. If formal dress is to be required in a gaming room it should be applicable to both sexes.

## CONCLUSIONS OF LAW

After considering the pertinent applicable legislation and the corresponding amendments as well as the evidence, *ante*, we formulate the following conclusions of law:

1. The legislator validly delegated the legal authority which under Law 221, *supra*, the Economic Development Administration had to the Tourism Company, although in a more limited manner by reserving unto itself a legislative veto (veto which it has never used) regarding everything related to the gaming regulations and policy in Article 22 of Law No. 10, *supra*.

2. The law, better known as the Games of Chance Act, was approved before our Constitution and was a pioneer in this Hemisphere.

3. Gambling was proscribed in the Penal Code of 1937, Art. 299, *et seq.* Gradually games were legalized in Puerto Rico, including betting games ("picas") at patron day festivals, bingos for charitable purposes and in the casinos, state lottery, cockfights, horse racing, the municipal lottery, dice, roulette, cards and slot machines. There is only one prohibition remaining from that Penal Code, the numbers game.

4. The applicable legislation varies from case to case. We conclude that the legislator can classify games of chance and give it some differential and uniform treatment by reasonable category without violating the equal protection of the law nor demanding that we adopt an analysis that is not the traditional one if there are no classifications within one same group. *Buscaglia v. Tribl.*

*Contribuciones*, 1945, 64 D.P.R. 602. The requirement that Section 4(e) of the Regulation places on and over the male tourist in demanding the use of a suit or sports jacket, without his being able to take it off while he is in the casino, while no formal dress is required to the female tourist, is suspicious, *Zachary Int'l., infra*, in addition to the denigrating and disagreeable view that it imposes on the individual and the public who visit the casino.

5. The Economic Development Administration, although without defining the terms, interpreted the letter and meaning of the legislator regarding the prohibition of advertising in the more limited acceptance of a public advertisement, hired and paid for, by providing: "Concessionaires will not announce the gaming rooms in Puerto Rico in *newspapers, magazines, radio* or in any other manner in which the advertisement *directly* reaches the public." (Section 76a-1[7] (underscore ours)).

6. In 1971, observing the procedure established in Article 22 of its organic law—in other words, with legislative approval—defendant amended its previous wording and paraphrased it exactly the same as the ample letter of the law. We find said action valid, the same as we find the substitute rule valid because it is not contrary to law from its face.

7. There is no legislative history regarding the purpose of Section 8 of the law. The only expression of public policy for the approval of Law 221, which is the one in controversy hereir., is that which was made part of the body of the law as its first section, clearly establishing that the reason to legalize those games was to contribute to the promotion of tourism. It does not appear that on that date the public policy was to discourage tourism, but the con-

trary. Therefore it is not necessary that we preoccupy ourselves with the history and a debate regarding slot machines which arises more than three decades later in order to clarify the legislative intention of the law which is in controversy.

8. We assume that the legislator was worried about the participation of the residents of Puerto Rico on what on that date constituted an experiment, since one does not legislate without a purpose nor in an impractical manner. Therefore, he prohibited the gaming rooms from announcing themselves or offering themselves to the public—which we reasonably infer are the *bona fide* residents of Puerto Rico. Another interpretation conveys the absurdity that the tourist that is on the Island cannot be offered the casino—something which is contrary to what the legislator promoted. Therefore, we also conclude that what the legislator foresaw and prohibited was the invitation to play at the casinos through publicity campaigns or advertising in Puerto Rico addressed to the resident of Puerto Rico. He wanted to protect him.

9. The operation of a casino today is a legal business like any other. It is not reasonable to deny their existence, nor is there any reason to hide them. If they are allowed, as they are, they must be allowed to operate commercially in a reasonable manner.

10. From the minutes of the debate of the project which became law in 1948 it is apparent that the tourism program was so critical for our economy that games which had until then been banned were authorized and promoted. Today, as yesterday, it still has the same importance, as shown by the recent legislation and debate, to help the existing hotel confront their problems and save the work of thousands

of Puerto Ricans and residents who compete with other touristic centers.

11. We find no legal basis to sustain a prior censorship of the press, as occurred with the taking of photographs of the slot machines for articles or reports which are functions attributed to a democratic country, such as was the debate regarding the elimination and then reduction of the slot machines in Puerto Rico. We were also not shown the need to prohibit the tourist from entering the casino with his camera, to the point that it could be confiscated temporarily by the inspector. Said action is contrary to the public policy of promoting tourism by imposing a lien primarily on the daytime tourist that is visiting points of interest and who, in order to see a casino in operation, has to dispose of his camera or desist from enjoying this pleasure. From the wording of the applicable text we interpret that the regulatory restriction is limited to the context of the section which requires prior administrative approval of advertisements for the exterior and photographs of the interior of the casino. We are not concluding that defendant cannot regulate the mode and place to photograph the casinos if valid reasons and parameters are presented in the regulation to said effect. We only conclude that this prohibition should not extend to third persons not covered by Law 221 without regulating said limitation; nor does it justify, pursuant to present legislation, that in order to prevent the announcements to residents, the liberty of the press and of the tourist to take a momento of his trip be limited.

12. It is our interpretation that the only advertisement prohibited by the law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo

tables. Certainly a press conference is not an advertisement and its censure constitutes a non-permissible intrusion in our constitutional scheme. A photo of a tourist, although seen by a resident friend or family, is not the advertisement which the law prohibits, as neither is a calling card, plaintiff's trade name, the use of titles in letters, letterheads on stationery and envelopes. The specialized meaning in the field of publicity and promotion cures the ambiguity and/or the statute's imprecision and its unconstitutionality for lack of due process.

13. Sections 1, 4, 6, 7 and 20 of Article II, Bill of Rights of the Constitution of Puerto Rico, and the first, fifth and fourteenth amendments of the Constitution of the United States are applicable to the controversy in this action.

14. According to law we issue a declaratory judgment because there is a controversy of interpretation regarding a statute which affects statutory and constitutional rights. (32 L.P.R.A., Ap. III R. 59, *Charana v. Pueblo*, 1980, 109 D.P.R. 641.)

### OPINION

Although the lower courts have authority to issue an order regarding the unconstitutionality of a law, said pronouncement is limited and *inter se*, and it is the majority of the justices of the Supreme Court who are invested with the great responsibility of judging whether a statute violates the Constitution of Puerto Rico (L.P.R.A., prec. T. 1, 4 L.P.R.A., sec. 37(a); *Figueroa Ferrer v. E.L.A.*, 1978, 107 D.P.R. 250; *P.S.P. v. Srio. de Hacienda*, 1980, 110 D.P.R. 313. The norm that a statute in Puerto Rico is presumed to be constitutional until the Supreme Court states the contrary, is still operative. *Cerame Vivas v. Srio. de Salud*, 1970, 99 D.P.R. 45, *Esso Standard Oil v. A.P.P.R.*, 1968, 95 D.P.R. 772.

It is the duty of this Court to try to save the constitutionality of the law while there are still alternate methods of resolving a controversy. *P.P.D. v. Adm. General de Elecciones*, 1981, 111 D.P.R. 199; *Mari Bras. v. Mayor*, 1972, 100 D.P.R. 506; *E.L.A. v. Aguayo*, 1965, 80 D.P.R. 552. If this case can be disposed of in harmony with the interests of plaintiff and in consonance with the best interests of justice, our mission is to prevent a constitutional clash, by validating the statute, but toning it down when possible or necessary. *P.S.P. v. State Election Board*, 1980, 110 D.P.R. 400.

In our opinion, the classification which the legislator has made of the games of chance in general is not suspicious. Having been challenged the violation of the clause of equal protection of the law, we must determine the reasonability of the established classification, *P.S.P., P.P.D., P.I.P. v. Romero Barcelo*, 1980, 110 D.P.R. 248. Since cockfighting, horse racing, small betting games (picas) and the lottery have been traditionally part of the Puerto Rican's roots, the legislator could have been more flexible than in authorizing more sophisticated games which are not so widely sponsored by the people. Therefore, since Law 221 itself does not establish classifications and equal treatment is given to the holders of franchises, and what is questioned is the dissimilarity of the conditions to legalize the games of chance banned by the Penal Code of 1937, we conclude that it is not necessary to adopt the criteria of strict scrutiny. *Zacry Int'l v. Superior Court*, 1975, 104 D.P.R. 267.

The classification that we do find suspicious, and which came to our attention during the course of this cause of action, *ACAA v. Enrique Bird Pinero*, C.A. 1984 Number 46, is the one made in section 4(e) of the Gaming Regulation (15 R.R.P.R. Sec. 76-a4[e]) requiring that the male tourist wear a jacket within the casino. On one hand,

Puerto Rico is a tropical country. Adequate informal wear, such as the guayabera, is in tune with our climate and allows the tourist to enjoy himself without extreme, and in our judgment unconstitutional, restrictions on his stay on the Island. On the other hand, said requirement does not improve at all the elegant atmosphere that prevails in our casinos, since the male player may be forced to wear a horribly sewn jacket, so prepared to prevent people from taking them, which to a certain point is degrading for the man and discriminatory, since women are allowed into the casino without any type of requirement for formal wear. The Honorable Supreme Court in *Figueroa Ferrer, supra*, stated: "parliaments are not the only necessary agents of social change" and "when you try to maintain a constitutional scheme alive, to preserve it in harmony with the realities of a country, the court's principal duty is to legislate towards that end, with the tranquility and circumspection which its role within our governmental system demands, without exceeding the framework of its jurisdiction". To save the constitutionality of the Law under our consideration, we must bend the requirement of formal wear since this is basically a condition of sex and the State has no reasonable interest which would warrant a dissimilar classification.

We can also dispose of the attack on ambiguity and imprecision which violates the guarantee of due process of law, pursuant to our interpretation of what constitutes an advertisement and the public of Puerto Rico in light of our conclusions of law. The validity of a statute is determined by what may reasonably be done pursuant to same and not by what has been done under the same. *Torres v. Castillo Alicea*, 1981, 111 D.P.R. 792. Applying this norm we conclude that because of the lack of regulatory standards which would have allowed to reasonably infer the proscribed conduct, and clear and consistent guidelines to

regulate the discretion of the officer in charge of its implementation, it is clear and uncontested, as admitted by the Secretary of Justice in his brief, that the administrative application exceeded the legislative zeal, it was erratic and inconsistent, arbitrary and capricious, extreme and absurd, and therefore, totally unconstitutional. The law on its face is constitutional, but not the interpretation which has been given to it up to now.

It is our unavoidable responsibility to establish what can be done pursuant to the statute and what cannot be done to prevent a recurrence of this untenable situation and supply the guidelines which defendant should have promoted to control the obvious abuse of discretion that was overwhelmingly proven to us. In view of the ample faculties recognized to the courts in cases in which the enforcement or the bad implementation of a statute reaches the extreme of inhibiting freedom of expression, *Nieves v. Lopez*, 61 D.P.R. 269 (1961), for the aforementioned constitutional purpose, and for the purpose of serving judicial economy to prevent possible misunderstandings between the casino operators and the Tourism Company, hereinafter we reformulate paragraph (7) of Section 1, as amended in 1971, and Section 4 of the Gaming Regulation adopted by the Consultive Board of Tourism in August 22, 1949, and filed with the Department of State on September 6, 1957, as thereafter amended, as well as Section 218 (15 R.R.P.R. 76-218) of the Gaming Regulations related to the franchising process before the Secretary of the Treasury which paraphrases the controverted Section 8 of the law, to harmonize it with Rule 1(7) which we reformulate hereinafter:

# "SECTION 1. CONCESSIONAIRES

.....

(1) .....

(2) .....

(3) .....

(4) .....

(5) .....

(6) .....

(7) Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos.

We hereby authorize the publicity of the casinos in newspapers, magazines, radio, television or any other publicity media, of our games of chance in the exterior with the previous approval of the Tourism Company regarding the text of said ad, which must be submitted in draft to the Company. Provided, however, that no photographs, or pictures may be approval of the Company.

We hereby allow, within the jurisdiction of Puerto Rico advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident. Within the ads of casinos allowed by this regulation figure, for illustrative purposes only, advertising distributed or placed in landed airplanes or cruise ships in jurisdictional waters and in restricted

areas to travelers only in the international airport and the docks where tourist cruise ships arrive since the principal objective of said announcements is to make the tourist in transit through Puerto Rico aware of the availability of the games of chance as a tourist amenity; the ads of casinos in magazines for distribution primarily in Puerto Rico to the tourist, including the official guide of the Tourism Company 'Que Pasa in Puerto Rico' and any other tourist facility guide in Puerto Rico, even though said magazines may be available to the residents and in movies, television, radio, newspapers and trade magazines which may be published, taped, or filmed in the exterior for tourism promotion in the exterior even though they may be exposed or incidentally circulated in Puerto Rico. For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourist.

We hereby authorize advertising in the mass communication media of the country, where the trade name of the hotel is used even though it may contain a reference to the casino provided that the word casino is never used alone nor specified. Among the announcements allowed, by way of illustration, are the use of the trade name with which the hotel is identified for the promotion of special vacation packages and activities at the hotel, in invitations, 'billboards', bulletins and programs or activities sponsored by the hotel. The use of the trade name, including the reference to the casino is also allowed in the hotel's facade, provided the word 'casino' does not exceed in proportion the size of the rest of the name, and the utilization of lights and colors will be allowed if the rest of the laws regarding this application are complied with; and in the menus, napkins, glasses, tableware, glassware and other items used within the hotel, as well as in calling cards, envelopes and letterheads of the hotel and any other use which constitutes a means of identification.

The direct promotion of the casinos within the premises of the hotels is allowed. In-house guests and clients may receive any type of information and promotion regarding the location of the casino, its schedule and the procedure of the games as well as magazines, souvenirs, stirrers, matchboxes, cards, dice, chips, T-shirts, hats, photographs, postcards and similar items used by the tourism centers of the world.

Since a *clausus* enumeration of this regulation is unforeseeable, any other situation or incident relating to the legal restriction must be measured in light of the public policy of promoting tourism. If the object of the advertisement is the tourist, it passes legal scrutiny.

The entry into gaming rooms with cameras is allowed, but it shall be the concessionaire's responsibility to post, in a visible area within the casino, the rule that the taking of photographs within the Casino is not allowed unless the taking of same inside the casino is authorized by the government inspector on duty and Management, and to adopt any preventive or corrective measures it may deem necessary regarding the misuse of this authorization, including the requirement that cameras be stored in bags which may contain the trade name of the hotel in question, or choose the option to inform that the abuse of this permission may imply confiscation of the film by Management or the Inspector, among others."

....

#### "SECTION 4. RULES FOR PLAYERS

(a) ....

(b) ....

(c) ....

(d) ....

(e) The concessionaire will determine how formal the dress of its clients must be, provided they maintain a proper and decorous image.

....

#### "SECTION 218. PROHIBITION OF PUBLICITY IN AN AUTHORIZED GAMING ROOM; MINORS.

No gaming room will be allowed to advertise or offer itself to the public of Puerto Rico, as indicated in Section 1(7) of the General Rules applicable to concessionaires; nor to admit persons under 18 years of age."

We are of the opinion that so restricted the definition of the controverted terms the law is validated and thus prevented the repetition of an uncertain application without limiting the fundamental right to freedom of expression of the concessionaire more than necessary.

In order to prevent any doubts whatsoever once our judgment is final and binding, it is hereby provided that through a request from any party in this case, the Secretary of State will receive a certified copy of this judgment. The Secretary of State is ordered to proceed to publish the Regulation which was restructured herein (pages 30-32 of this judgment) pursuant to the provisions of the Regulations Act of Puerto Rico, Act No.

#### SENTENCE

WE HEREBY DECLARE that the interpretation of defendant of Section 8 of the Gaming Act is clearly erroneous and exceeds the will of the Legislator as well as the letter of the law.

IT IS HEREBY DECLARED that the application of the law and the regulation by defendant has the defect of be-

ing unconstitutional because it has been arbitrary and capricious, ambiguous, inconsistent, erratic and excessive, producing absurd results which must be prevented in the interpretation, pursuant to the rules of legal construction.

IT IS HEREBY DECLARED that by retroactively applying the norms which were unknown by plaintiff, his rights to due process of law were violated and that if we continue to allow the controverted administrative ruling to prevail, it would continue to violate the constitutional rights guaranteed by Sections 1, 4 and 7 of the Bill of Rights of the Constitution of Puerto Rico, and therefore we declare it null and void.

IT IS HEREBY DECLARED that the regulatory provision related to the use of jackets by men may have been valid at the time it was adopted, but in this historical moment in which we all live in, a condition based on the differentiation of sexes, is not valid under our constitutional scheme and warrants that it be tempered to our times and state of law.

WE HEREBY DECLARE that Section 8 of the law is not unconstitutional from its face and is sustained, modified by the guidelines issued by this Court on this date. These guides-regulations may be amended in the future by the enforcing agency pursuant to the dictates of the changing needs and in accordance with the law and what is resolved herein.

BE IT REGISTERED AND NOTIFIED.

In San Juan, Puerto Rico, December 12, 1984.

(signed)  
GUILLERMO ARBONA LAGO  
Superior Court Judge

**Appendix C (1)—Informative Motion to the Supreme Court of Puerto Rico (Translation).**

**TRANSLATION**

IN THE  
SUPREME COURT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

Writ of Appeal.

Declaratory Judgment of the Superior Court, San Juan  
Section

Civil Case No. 82-1508

Case No. 0-85-14

**INFORMATIVE MOTION**

TO THE HONORABLE SUPREME COURT OF PUERTO  
RICO:

Now appears Plaintiff-Appellant Condado Holiday Inn, represented by the undersigned attorney and respectfully informs the Honorable Court that on this same date it has filed the Writ of Appeal, copy of which is appended, before the Honorable Superior Court, San Juan Section, pursuant to the provisions of the Rules of Civil Procedure of 1979 and the Regulations of this High Court.

We certify that we are sending a set of the documents filed with the respective Clerks of this Honorable Court and of the Superior Court by certified mail, return receipt requested, to:

Juan M. Correa Suarez, Esq.  
Attorney for Defendant-Appellee  
Box 4435  
Old San Juan Station  
San Juan, Puerto Rico 00905

Juan Alberto Moure, Esq.  
Attorney for the Secretary of Justice  
Box 192  
San Juan, Puerto Rico 00902

THUS IT IS HEREBY CERTIFIED in San Juan, Puerto Rico, this 14th day of January, 1985.

ATTORNEY FOR PLAINTIFF-APPELLANT

(sgd.)  
MARIA MILAGROS SOTO  
Banco Central—Suite 815  
Hato Rey, Puerto Rico 00917

**Appendix C (2)—Writ of Appeal to the Supreme Court of Puerto Rico. (Translation).**

TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO  
San Juan Section

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Condado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

Civil No. 82-1508 (908)

RE: DECLARATORY JUDGMENT

APPEAL  
TO THE SUPREME COURT OF PUERTO RICO

TO THE HONORABLE COURT:

Now comes Plaintiff-Appellant represented by the undersigned attorney, and pursuant to the applicable pro-

visions of the Rules of Civil Procedure, formalizes within the applicable legal term the appeal to the Honorable Supreme Court of Puerto Rico of the Declaratory Judgment issued by this Honorable Court on December 12, 1984 and filed on December 14, 1984.

### JURISDICTION

The Jurisdiction of the Honorable Supreme Court to entertain this Appeal arises from Article V of the Constitution of Puerto Rico itself, of the faculties and competence of said High Court pursuant to its constitution, 4 L.P.R.A. Sections 31 *et seq.*, and Rules 53 and 54 of the Rules of the Supreme Court, with which this Appeal complies as well as with Rules 52, 53 and 54 of the Rules of Civil Procedure of 1979.

The term to notify and formalize the Appeal expires on January 14, 1985.

### THE APPEALED JUDGMENT

From the aforementioned Declaratory Judgment we accept as correct the Findings of Facts; the narration of the facts and the controversies presented; the conclusions of law regarding defendant's application of the gaming laws and regulations as arbitrary, inconsistent, erratic, absurd, erroneous and therefore, unconstitutional, and the corresponding declarations in the Judgment.

We appeal the conclusion of law that Section 8 of Law 221 of May 15, 1948, as amended, is not unconstitutional from its face and the corresponding declaration in the Opinion and Judgment; conclusion of law number 4 that the classification which the legislator made does not require any other analysis than the traditional one and that it does not violate the equal protection of the law; and the

corresponding statements in the Opinion of the Honorable Judge to sustain that said classification does not violate the clause of equal protection of the law.

We do not anticipate that a transcript of the evidence need be presented, nor a narrative exposition of the facts be necessary unless defendant-appellee should question the same.

### CONSTITUTIONAL ISSUES RAISED

Act 221, *supra*, was adopted before our Constitution. The doctrine of freedom of expression has evolved since then. The prior censorship of freedom of expression creates a presumption of constitutional invalidity. *Pena Clos v. Cartagena Ortiz*, 83 J.T.S. 83; *Pueblo v. Santos Vega*, 84 J.T.S. 102; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The prohibition of advertising the casinos to the public in Puerto Rico violates the freedom of expression rights protected by the Bill of Rights of our Constitution and that of the United States. The vagueness and broadness of the statute, in addition to violating the First Amendment constitutional right to freedom of expression, violates due process of law guaranteed by the Constitution by not giving due prior notice of the scope of the proscribed conduct and by promoting and/or allowing the arbitrary enforcement from case to case and depending upon the subjective criteria of the official who interprets same. A law which prohibits a concessionaire of a gaming license who conducts a legal business from any advertising creates a classification in terms of the protection of the First Amendment of the United States Constitution and our Bill of Rights especially when it allows businesses of the same nature to advertise. If the intrusion into freedom of expression is deemed invalid, the consequence is that the classification is also invalid. In both cases, when con-

stitutionally protected rights are involved it is necessary to make an analysis of strict judicial scrutiny.

The modern doctrine of protection of commercial expression has been equating these expressions to freedom of expression of words and ideas. First it was determined that the state can restrict the advertising of an illegal commercial activity and later evolved a corollary doctrine: if the activity is legal, the state cannot ban its advertising. In the light of the previously summarized issues, the following constitutional controversies must be resolved:

1. If Section 8 of Act 221 of May 15, 1948, as amended, is unconstitutional because it violates the right to freedom of expression in general; and the right to commercial freedom of expression in particular.
2. If Section 8 of the aforementioned law is unconstitutional because it violates the equal protection of the law.
3. If aforementioned Section 8 is unconstitutional because it is excessively broad, and is also ambiguous since it lacks any reasonable guidelines or parameters, in violation of the guarantee of due process.
4. If the total or previous ban to the publication of any advertisement of the gaming rooms, in view of the broadness and vagueness of the statute, and without any other classifications of legalized games being prohibited from advertising in Puerto Rico warrants a strict judicial scrutiny to sustain a decree of constitutionality.
5. If, violating the cited legal section and regulatory provisions adopted thereunder the fundamental right of freedom of speech, the state interest overrides the rigor of the constitutional clause.

6. If the statutory prohibition is broader than what is necessary to protect the public objective pursued, and, is therefore unconstitutional.

We do not attack the constitutionality of the Law, better known as the Games of Chance Act. The attack is circumscribed to the validity of Section 8 which provides:

"It is forbidden for any gaming room to advertise or (*sic*) offer itself to the public in Puerto Rico in any manner whatsoever nor to admit persons under 18 years of age."

We also attack the regulations adopted pursuant to it related to the prohibition to advertise the casinos, which are not limited as to manner, time and place.

## CONCLUSION

The zeal, interest, and responsibility of the trial judge when exercising his adjudicative function moves us to justify to the appealed Court the reason to insist on a determination that Section 8 of the Games of Chance Act is unconstitutional from its face.

We are before a facially unconstitutional statute which application arises in a continuous and recurrent form. The judgment of the Honorable Superior Court would force us to continuous recourse to the judicial forum in search of a remedy. This would naturally be contrary to the present judicial policy in the Puerto Rican procedural court system, and would constitute an undue interference with the freedom of expression rights of Plaintiff-Appellant in a continuous and irreversible form.

As an illustration, this Honorable Court may take judicial knowledge of a recent labor dispute in Appellant

hotel that culminated in a notorious lock-out in Puerto Rico. Here is one of the innumerable occasions when it was indispensable and could still be indispensable for a casino operator to make reference to the casino that the regulations impermissibly prohibits.

The evident recurrence of the grave situation to which Plaintiff-Appellant is subjected to, by the effectiveness of an unconstitutional statutory provision from its face justifies that this Honorable Court notes probable jurisdiction in this case.

WHEREFORE, we respectfully request that prior to the corresponding legal procedures the judgment of the Court below be set aside in so far as it upholds the statutory provision, object of this facial constitutional attack, and that the Court decrees its unconstitutionality in absolute terms.

Respectfully submitted in San Juan, Puerto Rico on January 14, 1985.

CERTIFICATION: I certify that as of the same date I have sent by certified mail, return receipt requested, an exact copy of this Notice of Appeal to Attorneys Juan A. Correa Suarez, Box 443, Old San Juan Station, San Juan, Puerto Rico 00905 and Jose Alberto Moure, Box 192, San Juan, Puerto Rico 00902.

(sgnd.)

MARIA MILAGROS SOTO  
Banco Central Building  
Suite 815  
Hato Rey, P.R. 00917  
Tel. 754-1920/1717

**Appendix D—Motion for Reconsideration.**

TRANSLATION

IN THE

SUPREME COURT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

No. 0-85-14

APPEAL FROM THE SUPERIOR COURT, SAN JUAN  
SECTION

Declaratory Judgment.

TO THE HONORABLE SUPREME COURT OF PUERTO  
RICO:

Now appears Plaintiff-Appellant represented by the undersigned attorney and very respectfully requests that this High Court reconsider its Resolution of February 7,

1985 dismissing the appeal of the Declaratory Judgment of Honorable Superior Judge Guillermo Arbona Lago, San Juan Section, notified on February 11, 1985 and received by this appearing party on February 12, 1985, because it was deemed that it did not present a substantial constitutional question.

We respectfully allege that the total prior censorship of the right to freedom of expression presents a substantial constitutional question as substantial as is substantial our democratic system.

The Supreme Court of the United States has understood so accordingly and has granted the recourse, resolving the issue in the following cases: *United States v. O'Brian*, 391 US 367, (1968); *Procunier vs. Martinez*, 416 US 396 (1974); *Bigelow v. Virginia*, 421 US 809 (1975); *Virginia Pharmacy Board vs. Virginia Consumer Council*, 425 US 748 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 US 85 (1977); *Carey vs. Population Services International*, 431 US 678 (1977); *Bates v. State Bar of Arizona*, 433 US 350 (1977); *First National Bank of Boston vs. Bellotti*, 435 US 765 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 US 447 (1978); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 48 LW 4783 (1980); *Consolidated Edison Co. v. Public Service Comm'n.*, 447 US 530 (1980); *Village of Schaumburg v. Citizens for a Better Environment*, 444 US 620 (1980); *Schad v. Borough of Mr. Ephraim*, 49 LW 4597 (1981); *Sambo's Restaurant, Inc. vs. City of Ann Arbor*, 50 LW 2286 (1981); *Metromedia, Inc. vs. City of San Diego*, 453 US 490 (1981); *Heffrom v. Int'l Society for Krishna Consciousness*, 452 US 640 (1981); *Min. v. Century Camara, Inc.*, 50 LW 1038 (1981); *Globe Newspaper Co. vs. S. Ct. for the County of Norfolk*, 50 LW 4759 (1982); *In re R.M.J.*, 50 LW 4185 (1982); *National Ass'n for the Advancement of Colored People vs. Clairborne Hardware Company*, 50 LW 5122 (1982); *Bolger vs.*

*Youngs Drug Products Corp.*, 51 LW 4961 (1983); *F.C.C. v. League of Women Voters of California*, 52 LW 5008 (1984); *Clark v. Community for Creative Non-Violence*, 52 LW 4986 (1984); *Secretary of state of Md. vs. Joseph H. Munson Co., Inc.*, 52 LW 4875 (1984).

In *Bolger, supra*, the Supreme Court of the United States made an excellent analysis-synthesis of american jurisprudence, including the contribution of great part of the cases which we have cited herein, to the great defense of the constitutional right to freedom of expression protected by the first amendment of the United States Constitution which that High Court has been developing.

This Honorable Supreme Court has resolved since *Aponte vs. Lugo*, 100 D.P.R. 282 (1971) that the liberty mentioned in the Constitution of Puerto Rico and in the First Amendment protected by Amendment XIV of the Constitution of the United States comprises freedom of speech, and adopted the guidelines of *O'Brian, supra*, in *Soto vs. Gimenez Munoz*, 112 DPR 477 (1982) stating:

"The ideal of a true democracy as a desideratum in which our Constitution is inspired conceives freedom of speech \* \* \* "within the most dilated vision". The bill of rights expressly consigns that any law restricting said liberties will not be approved."

and quoted with approval *Bellotti, supra*, in which case Honorable Judge Marshall had stated that faced with previous bans, the protection of freedom of expression is practically invincible.

This Honorable Court also recently stated in *Pueblo v. Felix Santos Vega*, 84 JTS 102:

"Movies and analogous objects (books, magazines and other publications) cannot be

banned without a constitutionally valid judicial order; to do otherwise would constitute a previous censorship."

The trend followed in this case and the statements of this Honorable Court in *Zachry Int. vs. Superior Court*, 104 DPR 267 (1975) to the effect that a previous and total ban to all expression regarding an activity legislatively authorized by the government is unconstitutional, convinced us that our recourse would be granted.

Section 8 of Act 221 of March 15, 1948, as amended, constitutes a previous and total ban to all expression regarding the games of chance, legislatively authorized and therefore, legal.

In *Pittsburgh Press, supra*, the Supreme Court of the United States established the criteria that if the activity is *illegal*, the State can ban its advertising. In *Bigelow, supra*, the criteria was broadened to if the activity was *legal*, advertising could not be prohibited. And, in *Virginia State Board of Pharmacy, supra*, commercial freedom was granted the same protection as pure freedom of expression.

In our development of the law, we find ourselves in the stage of *Bigelow*.

We respectfully submit that a citizen who exercises a business as legal as any other business cannot be totally gagged.

We respectfully request the Honorable Court to reconsider its resolution, issue the appeal requested and grant us the opportunity to elaborate our pleadings in the memorandum of appeal contemplated by the Regulations of the Honorable Supreme Court of Puerto Rico.

In San Juan, Puerto Rico, February 22, 1985.

(signed)

MARIA MILAGROS SOTO  
Attorney for Plaintiff-Appellant  
Banco Central—Suite 815  
Hato Rey, Puerto Rico 00917  
Tel. 754-1920/1717

I CERTIFY that on this same date I have sent a copy of this Motion of Reconsideration to Juan M. Correa Suarez, Esq., attorney for Defendant-Appellee, and Jose Alberto Moure, Esq., attorney for the secretary of Justice, to their addresses of record.

(signed)

MARIA MILAGROS SOTO

le

**Appendix E—Resolution of March 7, 1985 (Translation).**

TRANSLATION

IN THE  
SUPREME COURT OF PUERTO RICO

---

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

No. 0-85-14

APPEAL FROM THE SUPERIOR COURT, SAN JUAN  
SECTION

---

RESOLUTION

San Juan, Puerto Rico, March 7, 1985

The motion for reconsideration is denied.

It was agreed by the Court and certified by the General Secretary. Associate Justice Mr. Rebollo Lopez would reconsider.

(signed)  
LADY ALFONSO de Cumpiano  
General Secretary

**Appendix F—Notice of Appeal, Dated March 29, 1985  
(Translation).**

**TRANSLATION**

IN THE  
**SUPREME COURT OF PUERTO RICO**

————— ● —————  
**POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,**

*Plaintiff-Appellant,*

vs.

**TOURISM COMPANY OF PUERTO RICO,**

*Defendant-Appellee.*

Case No. 0-85-14

**DECLARATORY JUDGMENT OF THE SUPERIOR COURT,  
SAN JUAN SECTION**

Civil Case No. 82-1508

**Appeal.**

————— ● —————

## WRIT OF APPEAL

MARIA MILAGROS SOTO  
 Attorney for Appellant  
 Banco Central, Suite 815  
 Hato Rey, P.R. 00917  
 Tels. 754-1920/1717

JUAN M. CORREA SUAREZ  
 Attorney for Appellee  
 Box 4435  
 Old San Juan Station  
 San Juan, P.R. 00905  
 Tel. 721-2400

JOSE ALBERTO MOURE  
 Attorney for Secretary of Justice  
 Box 192  
 San Juan, P.R. 00902  
 Tel. 721-2900

## TRANSLATION

IN THE  
 SUPREME COURT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATION D/B/A Con-  
 dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

Case No. 0-85-14

APPEAL FROM THE SUPERIOR COURT, SAN JUAN  
 SECTION

Declaratory Judgment.

NOTICE OF APPEAL  
 TO  
 SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE SUPREME COURT OF PUERTO  
 RICO:

Appellant respectfully appears herein represented by its  
 subscribing attorney to inform this Honorable Supreme  
 Court of the appeal to the Supreme Court of the United

States, within the legal term, of the Resolution of March 7, 1985, denying our Motion for Reconsideration filed on February 22, 1985 regarding the Resolution dated February 7, 1985 of this Honorable Court dismissing the appeal of the Declaratory Judgment issued by Honorable Judge Guillermo Arbona Lago on December 12, 1984 since it failed to present a substantial constitutional question.

The appeal filed is valid pursuant to the jurisdiction of the Honorable Supreme Court to revise the judgments and orders of this High Court when it raises the issue of the nullity of a statute of the Commonwealth of Puerto Rico for being repugnant to the Constitution of the United States of America and its validity has been sustained (28 U.S.C. sec. 1258).

In San Juan, Puerto Rico, March 29, 1985.

(signed)  
 MARIA MILAGROS SOTO  
 Banco Central—Suite 815  
 221 Ponce de Leon Ave.  
 Hato Rey, Puerto Rico 00917

CERTIFICATION: On this same date I have filed a copy of the writ of appeal with the Clerk of the Superior Court, San Juan Section, pursuant to Rule 10 of the Supreme Court of the United States and I have notified appellee by certified mail and the Secretary of Justice at its address of record and through the legal representative of the parties in this proceeding.

(signed)  
 MARIA MILAGROS SOTO  
 Banco Central—Suite 815  
 221 Ponce de Leon Ave.  
 Hato Rey, Puerto Rico 00917

**Appendix G—Resolution of April 11, 1985 (Translation).**

**TRANSLATION**

IN THE

**SUPREME COURT OF PUERTO RICO**

— ● —

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
 dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

No. 0-85-14

APPEAL FROM THE SUPERIOR COURT, SAN JUAN  
 SECTION

Declaratory Judgment.

— ● —

**RESOLUTION**

San Juan, Puerto Rico, April 11, 1985

Regarding the writ of appeal filed in the Supreme Court of the United States by appellant, the Court acknowledges same.

2g

It was agreed by the Court and certified by the General Secretary. Associate Justice Mr. Negron Garcia did not intervene.

(signed)  
LADY ALFONSO de Cumpiano -  
General Secretary

1h

**Appendix H—Letter of Maria Milagros Soto, Dated  
February 24, 1982.**

February 24, 1982

Frances Rios de Moran, Esq.  
Executive Director  
Tourism Company of Puerto Rico  
P. O. Box 3072  
San Juan, Puerto Rico 00903

Dear Mrs. Moran:

On behalf of my clients, Condado Holiday Inn and Puerto Rico Hotel and Tourism Association, I respectfully request a revision of TC's ruling of February 16, 1979 regarding the interpretation of the advertising prohibition of the Games of Chance Act and Regulations.

As you know, the Tourism Company was contemplating new legislation to expressly allow in-house advertising or information and qualify the prohibition to advertising through television, radio, magazines and other generally-regarded publicity media. This amendment to the Act seems now farfetched in view of the political struggle generated by the Governor's veto of the slots-machines bill approved by the Legislature and the pending increase-in-betting limits approved by the Governor but pending in the Legislature.

To await another year for a formal amendment, when in our opinion, your company may administratively adopt a more flexible interpretative opinion in consonance with the legislative intent and beneficial to you and us, as I will further on explain, seems a waste of time and resources, unwarranted at the critical moment the tourism industry is facing.

The institutional interpretation of Section 8 of Act 221 of May 15, 1948 (15 L.P.R.A. 77) is basically contained in the third paragraph of page 2 of said opinion, translated as follows:

"This prohibition includes the use of the word 'Casino' in match boxes, lighters, envelopes, stationery for *internal* or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, chinaware, lobbys, pennants, flyers, paperweights, pencils, telephone book, directories, bulletin boards, or in any dependency of the hotel or object that may be *accessible to the public* in Puerto Rico." (emphasis supplied)

What Section 8 really provides is that "No gambling room shall be permitted to *advertise* or otherwise *offer* their (SIC) facilities *to the public of Puerto Rico*". (Official translation and our emphasis). Although the Spanish version overrides the English translation, (31 L.P.R.A., Sec. 13) the latter makes more clear the legislative intent when it adds "or otherwise *offer*" not included in the Spanish text.

We all understand clearly that the Puerto Rican legislators intended to protect the public of Puerto Rico from casino advertising when they opted to legalize gambling as a contribution toward the development of tourism (Section 1, Act 221, *supra*). It is clear that gaming was geared toward the potential visitors or tourists. Nothing in the Act prohibits or limits advertising outside Puerto Rico. The legislators wanted the tourists to flock to the casinos to gamble, but not our own people. Thus, concessionaries were forbidden through the Act and Regulations as well as franchise conditions to advertise to the public of Puerto Rico.

The question is what did the legislators mean or intend when prohibiting "advertising"?

Did they mean excluding the word casinos in match boxes, lighters, pennants, flyers, pencils, paperweights and other souvenirs that can be given to the hotel guests to take back home and be used as a promotional tool to spread our island's image as a tourism destination?

Did they mean envelopes and stationery to be used *internally* in the Hotel? It is true that employees are part of the public of Puerto Rico but is internal correspondence an "offer of the casinos" to the public?

Did they mean stationery to be used externally when addressed for instance

a. to the Tourism Company

b. to customers for collection purposes

or any purpose other than a mailing to the public to advertise or offer the casino facilities? Who would a concessionaire be advertising to when writing a letter to TC?

Did they mean that a Casino Director, Manager or employee cannot use his title because it has the word "casino" and that's advertising?

Did they mean that in-house brochures or information on elevators, lobbys, bulletin boards or a Casino door, cannot indicate to the tourist, *already a hotel guest*, what to do, where and when? Is that advertising and offering the facilities to the public of Puerto Rico?

I suppose that through even a more literal interpretation even the tourists can be considered "the public of Puerto Rico" once they are here. But, is that what the legislative intent was?

We propose that it was none of the above.

Since you are the public institution vested with the authority to administrate the games of chance, you may either sustain this strict and literal interpretation which yields absurd results contrary to your own main objective of promoting tourism; or you may adopt an institutional interpretation, that while it safeguards the public from the intended mass advertising prohibited by law, it gives the industry the flexibility it needs to inform its guests of the nature of its facilities, their location and hours, including casinos, identify the casino employees for purposes other than "advertising", and provide souvenirs to take home that will at a low cost continue the promotion of the island among relatives and friends even though one of these souvenirs may be by chance *accessible to* the "public" within the premises of the hotel. We suggest the administrative ruling should envision "advertising" as an offer or effort *to attract* to the casinos the public of Puerto Rico. That is what you advertise for. If the public is already in the premises, be it visitors or guests from Puerto Rico, you need not to advertise lest you be wasting your money. Thus, an object, communication or information not directed to "offer" the casino *to the public* or attract the public of Puerto Rico to gamble should not be considered advertising.

In framing your opinion, we ask you to take into consideration the following grounds:

1. Communication is constitutionally protected under our First Amendment.
2. The prohibition of advertising casinos is unconstitutional under the Equal Protection of the Laws Clause. Advertising of other gambling activities are allowed in Puerto Rico.

3. There is no overriding state interest that could subordinate the constitutional guarantees on the face of other legal gambling activities of which the public of Puerto Rico freely and to a greater extent participate.
4. Our Civil Code (31 L.P.R.A. Sec. 14) provides that when the statute is clear and free of any ambiguity there is no need to seek the legislative intent. We contend that the statute is not clear, but that the use of the word "advertising" is doubtful (Section 17) and thus, the spirit of the law or legislative intent must be considered (Section 19).
5. Our Supreme Court has repeatedly rejected literal interpretations that yield absurd or unreasonable results. *Cerame Vivas v. Srio de Salud*, 1970, 99 DPR 45; *Esso Standard Oil v. A.P.P.R.*, 1968, 95 DPR 772; *M. Mercado e Hijos v. Juana v. Junta Azucarera*, 1968, 95 DPR 852; *Atilas v. Comision Industrial*, 1954, 77 DPR 16; *Colonos de Santa Juana v. Junta Azucarera*, 1954, 77 DPR 392; *Lozada v. Antonio Roig, Sucrs.*, 1952, 73 DPR 266; *Mas v. Borinquen Sugar Co.*, 1912, 18 DPR 304; *Celis Alguier v. Mendez*, 1912, 18 DPR 88; *Vivaldi v. Mariani*, 1906, 10 DPR 444.
6. The public of Puerto Rico is aware by now that there are casinos at the hotels in Puerto Rico.

While we realize that you have no authority to declare a statute and/or regulation unconstitutional or invalid, you have the sole responsibility of interpreting it reasonably, unbiased, and judiciously. Such is our petition!

As we discussed with you, and since the Company's interpretation now, if favourable, cannot be retroactively

applied, we have no choice but to challenge in Court the constitutionality and or validity of the advertising prohibition of the Act and Regulations, the erroneous past interpretation and the arbitrary application of the Act and Regulations to Condado Holiday Inn. Although other hotels have had similar experiences, it is the former that faces an irreparable damage.

We must state here, to make our intentions clear, that because of the close relationship needed between TC and the hotel industry for mutual interests, in the past, this issue was not pressed even though it had arisen, controverted and objected, giving birth to the opinion now object to this letter. When applied to Condado Holiday Inn, although the fines were objected, their amount did not seem then of sufficient weight to warrant expensive litigation and possible severance of the needed rapport with this Company. The scale weighed against a lawsuit.

But, the damage did not end with the payment of a fine and now surges as an impediment for the licensing of their hotel in Atlantic City as Condado Holiday Inn is found to be unsuitable for having been fined on two occasions. This finding is prejudicial to my client *now* for which reason we will seek a declaratory judgment and/or any other suitable proceeding. Even though we do not wish to sue you, it's not possible to have a case without a Defendant.

Rest assured that both Puerto Rico Hotel and Tourism Association and Condado Holiday Inn as well as myself are most anxious to cooperate with you in the tremendous challenge you have before you.

Sincerely yours,

MARIA MILAGROS SOTO

bcc: Messrs. Hugh Andrews  
Miguel Domenech  
Steve Hyde  
Bill Moriarity, Esq.

# Appendix I—Complaint (Translation).

## TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO

San Juan Section

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Condado Holiday Inn,

*Plaintiff,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant.*

Civil No. 82-1508 (908)

RE: DECLARATORY JUDGMENT

## COMPLAINT

TO THE HONORABLE COURT:

COMES NOW petitioner represented by the undersigned attorney and respectfully states and requests:

1. Petitioner is a partnership organized under the laws of the state of Texas and is a concessionaire of a license to operate a gaming room at present and since 1975 under Act 221 of May 25, 1948, as amended. (Exhibit A)

2. Defendant was created pursuant to Act No. 10 of June 18, 1970, which transferred the powers and faculties of the Economic Development Administration pursuant to Act 221, *supra*, to Appellee (Art. 17, Act No. 10, *supra*).

3. Section 8 of Act 221, *supra*, (15 L.P.R.A. Sec. 78) provides:

"Section 8. It is forbidden for any gaming room to advertise or offer itself to the public in Puerto Rico in any manner whatsoever \* \* \*

4. The applicable Gaming Regulation contains two provisions related to the publicity of the casinos.

a. Section 76-218 of the 1957 Regulation (15 RRPR) provides that:

It is forbidden for any gaming room to advertise or offer itself to the public in Puerto Rico in any manner whatsoever \* \* \*

b. Section 76a-1 (7) of the same date originally provided:

"(7) Concessionaires will not advertise gaming rooms in Puerto Rico in newspapers, magazines, radio or in any other manner in which the advertisement reaches the public directly."

This section was amended on May 22, 1973 and presently reads as follows:

"(7) No concessionaire, agent, or employee of same can announce the gaming rooms to the public in Puerto Rico. We authorize the publicity of gaming rooms in the exterior in newspapers, magazines, radio, television or any other means of publicity, with the previous approval of the Tourism Company regarding the wording of said announcement, which must be submitted in a draft to the Company \* \* \*

5. There is a controversy regarding the interpretation of the aforementioned legal and regulatory provisions (Appendix B).

6. On February 16, 1979 defendant adopted a literal interpretation of the law which produced absurd and unreasonable results, and which is included as Appendix C and is made part of this complaint.

7. Defendant (*sic*) retroactively applied said interpretation to occurrences prior to its publication, causing petitioner immediate damages consisting in administrative fines of \$1,500; and possible mediate irreparable damage consisting in the possible denial of a license to operate a casino in Atlantic City as the result of the fact that the investigation performed by the Department of Gaming Enforcement of that jurisdiction indicated that petitioner had violated the gaming laws and regulations of Puerto Rico (Appendix D). The pertinent administrative hearings will begin on or around March 18, 1982 and will continue during more or less two weeks.

8. Defendant also fined petitioner for exercising his right to freedom of expression in a press conference.

9. The Gaming Laws and Regulations, as far as the aforementioned provisions relating to an absolute ban on the gaming rooms to advertise, is unconstitutional because:

a. It violates the constitutional rights of petitioner protected by the First Amendment to the Constitution of the United States, and of Puerto Rico.

b. There is no substantial public interest to limit the right to commercial expression.

c. It violates the constitutional guarantee of equal protection of the laws protected by the Constitution of the United States and Puerto Rico since other games of chance, such as the lottery, horse races and cock fights are allowed to advertise to the public in Puerto Rico, of which we request the court to take judicial notice.

10. The retroactive application of the administrative interpretation violates the constitutional guarantee of due process of law and constitutes an arbitrary, capricious and unjust administrative act with dire consequences to petitioner.

11. The administrative interpretation is a literal one which exceeds the legislative intention, is unreasonable and produces absurd consequences, wherefore we attack its retroactive and prospective validity.

WHEREFORE, we respectfully request from this Honorable Court that pursuant to the extraordinary applicable procedures, it give priority to setting the hearing

date of this case pursuant to Rule 59 of the Rules of Civil Procedure of 1979 and in its day grant our petition for declaratory judgment.

In San Juan, Puerto Rico, March 12, 1982.

MARIA MILAGROS SOTO  
Edif. Banco Central  
Suite 1115  
Hato Rey, Puerto Rico 00917  
Tel. 754-1920

I HEREBY CERTIFY

That on this same date I have sent copy of this Complaint to the Secretary of Justice pursuant to Rule 21.3 of the Rules of Civil Procedure of 1979 in order that it inform this Honorable Court if it will exercise the right to intervene granted by Rule 59.6.

(signed)  
MARIA MILAGROS SOTO

## TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO

San Juan Section

————— ● —————

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,

*Plaintiff,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant.*

Civil No. 82-1508 (908)

RE: DECLARATORY JUDGMENT

————— ● —————

SWORN STATEMENT

I, PASQUALE MICHAEL VOLONINO, under oath state:

1. That my name is as stated, that I am of legal age, married, comptroller of the Condado Holiday Inn Casino, and a resident of Guaynabo, Puerto Rico.

2. That I am authorized to represent petitioner in this case since Mr. Hugh Andrews is not in Puerto Rico.

3. That since 1975 I have been involved with defendant's administrative actions related to the application of the gaming law and regulations and, specifically, with the interpretation of the prohibition regarding advertising to the public in Puerto Rico.

4. That I have read the preceding complaint, which has been written by our subscribing lawyer pursuant to our instructions and wishes and all the facts alleged in same are true and are personally known to me, except those which are alleged pursuant to information and belief, which I also believe are true.

In San Juan, Puerto Rico, this 12th day of March, 1982.

(signed)  
PASQUALE MICHAEL VOLONINO  
Declarant

Affidavit No. 432

Sworn and subscribed to before me by declarant, of the above described personal circumstances, whom I give faith I personally know in San Juan, Puerto Rico, this 12th of March, 1982.

(signed)  
MARIA MILAGROS SOTO  
Notary Public

herein appears notarial seal

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**Appendix J—Memorandum of Authorities (Partial Translation).**

TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO

SAN JUAN SECTION

—————●—————

POSADAS DE PUERTO RICO ASSOCIATION D/B/A Con-  
dado Holiday Inn,

*Plaintiff,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant.*

Civil No. 82-1508 (908)

RE: DECLARATORY JUDGMENT

—————●—————

MEMORANDUM OF AUTHORITIES

TO THE HONORABLE COURT:

Now appears plaintiff represented by the undersigned attorney and respectfully requests from this Honorable

Court that it declare unconstitutional Section 8 of Act 221 of May 15, 1948, as amended, and the regulatory provisions adopted thereunder.

## JURISDICTION

The jurisdiction of the Honorable Court is invoked pursuant to Rule 59 of the Rules of Civil Procedure of 1979.

## CONSTITUTIONAL PROVISIONS IN CONTROVERSY

### I. Constitution of the Commonwealth of Puerto Rico

#### Preamble . . .

"We understand a democratic system to be one where the will of the people is the source of public power, *where public order is subordinated to the rights of man* and where the freedom of the citizen to participate in collective decisions is insured." (Italics added)

### Article II. BILL OF RIGHTS

§1. "The dignity of the human being cannot be violated. *Pursuant to law all men are created equal.* A person cannot be discriminated against for reasons of race, color, sex, birth origin or *social condition*, nor political or religious ideas. The laws as well as the public educational system shall contain these principles of *essential human equality.*" (Italics added)

§4. "Any law restricting freedom of speech or of the press or the right of the people peaceably to assem-

ble, and to petition the Government for a redress of grievances cannot be approved."

§6. "Persons may freely associate and meet for any legal purpose, except in military or quasi-military organizations."

§7. "The freedom to life, *liberty* and the pursuit of property is recognized as a basic right of the human being. The death penalty shall not exist. *A person shall not be deprived of his freedom or property without due process of law, nor shall any person in Puerto Rico be denied equal protection of the laws*" (Italics added)

§20. The Commonwealth of Puerto Rico also recognizes the existence of the following human rights:

. . .

"The right of all persons to obtain work."

"The right of all persons to enjoy an adequate level of life which will insure him and his family health, welfare and especially food, dress, housing, medical assistance and necessary social services."

. . .

. . .

"In their obligation to promote *the integral liberty of the citizen, the people and the government of Puerto Rico* will try to promote the largest possible expansion of its productive system, insure the

most just distribution of its economic results and achieve the highest comprehension between individual initiative and collective cooperation. *The Executive Power and the Judicial Power* must always bear this duty in mind and consider the laws which tend to comply with it in the most favorable manner *possible*." (Italics added)

## II. Constitution of the United States of America

### Article I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, *or abridging the freedom of speech* or of the press, or the right of the people peaceably to assemble, and to petition to Government for a redress of grievances." (Italics added)

### Article V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*, nor shall private property be taken for public use, without just compensation.

## Article XIV

"Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, *nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Italics added)

...

## LEGAL BACKGROUND

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**Appendix K—Memorandum of Reply (Partial Translation).**

TRANSLATION

IN THE

SUPERIOR COURT OF PUERTO RICO

SAN JUAN SECTION

—●—

POSADAS DE PUERTO RICO ASSOCIATION D/B/A Con-  
dado Holiday Inn,

*Plaintiff,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant.*

Civil No. 82-1508 (908)

Declaratory Judgment

—●—

MEMORANDUM OF REPLY

TO THE HONORABLE COURT:

Now appears plaintiff represented by the undersigned  
attorney and respectfully submits its Reply to the

memorandum of the Honorable Secretary of Justice, hereinafter denominated the State, since we understand that defendant shall not submit a separate brief.

We respectfully understand that our Memorandum of Authorities sustains, on the basis of recent case law, the constitutional attack of the controversy at bar. Most of the cases which the State relies on have already been cited as our authorities. Naturally the facts in no two cases are alike and what is important is the application of the doctrine which rules in our jurisdiction and in that of the United States to facts which, although always distinguishable, maintain essential similarity to qualify for the protection which our Constitution and that of the United States offers.

Therefore, our Reply will evolve around:

1. The limitation that the State has made of the controversy, as one which deals merely with a commercial advertisement.
2. The limitation that the state has made of the doctrine of strict judicial scrutiny.
3. The inapplicability of the cases cited by the State, which were not contained in our presentation on the doctrine of strict judicial scrutiny.
4. The validity of the legislative intention on which the State relies on to sustain the legitimacy of *Section 8, supra*.
5. The existence of a pressing interest vis-a-vis a rational interest of the State.
6. The appropriateness of the declaratory judgment writ.

7. The impossibility of disposing of this appeal without deciding the constitutional attack. Without necessarily following the order stated above extracted from the order which the State observed in its presentation.

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• • •

## MERITS OF THE DECLARATORY JUDGMENT

**MOTION**

SEP 30 1985

JOSEPH F. SPANIOLO, JR.

CLERK

No. 84-1903

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

POSADAS DE PUERTO RICO ASSOCIATES, d/b/a  
CONDADO HOLIDAY INN,

*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO, *et al.*,*Appellees.*

On Appeal from the Supreme Court of Puerto Rico

**MOTION TO DISMISS OR TO AFFIRM**

HECTOR RIVERA CRUZ

*Attorney General*

\*REINA COLON DE RODRIGUEZ

*Assistant Solicitor General*

Box 192

San Juan, Puerto Rico 00902

Phone (809) 721-2900, Ext. 304

JUAN A. CORREA SUÁREZ

Puerto Rico Tourism Company

Box 4435

Old San Juan Station

San Juan, Puerto Rico 00905

Phone (809) 721-2400, Ext. 267

*Attorneys for Appellees*

\*Counsel of Record

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

No. 84-1903

POSADAS DE PUERTO RICO ASSOCIATES, d/b/a  
CONDADO HOLIDAY INN,  
*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO, *et al.*,  
*Appellees.*

On Appeal from the Supreme Court of Puerto Rico

**MOTION TO DISMISS OR TO AFFIRM**

*To The Honorable Court:*

Now come the Tourism Company of Puerto Rico and the Commonwealth of Puerto Rico hereinafter named as the appellees and respectfully move this Honorable Court to dismiss the appeal in the above entitled case on the ground that it does not present a substantial federal question, or to affirm the judgment of the Supreme Court of the Commonwealth of Puerto Rico on the ground that the question presented by the appellant are so unsubstantial as not to need further argument.

**I. OPINION BELOW**

The reference made by Posadas de Puerto Rico Associates, d/b/a Condado Holiday Inn, hereinafter named as

Posadas, as to the decision below are adopted by the appellees.

## II. STATEMENT OF THE CASE AS TO THE POINTS ESSENTIAL TO THIS APPEAL

### A. Proceedings Below

On March 12, 1982, Posadas filed before the Superior Court of Puerto Rico, San Juan Part a declaratory judgment action, challenging, among other things, the constitutionality of Section 8 of the Act No. 221 approved on May 25, 1948, as amended (15 L.P.R.A., Sec. 77) known as the Games of Chance Act.

After the preliminary proceedings, the submission of memoranda of law and the holding of a hearing, the Superior Court upheld the constitutionality of Section 8 of the Games of Chance Act, but declared unconstitutional the regulations approved pursuant to the provisions of that act and for the enforcement of its Section 8, as well as the application of those regulations. In addition, the Superior Court supplied the guidelines for the adequate regulations pursuant to Section 8 of the law.

## III. ARGUMENT

### A. Jurisdictional Statement

In the present case the Superior Court of Puerto Rico, San Juan Part, upheld the constitutionality of Section 8 of the Games of Chance Act, *supra*. The Supreme Court of Puerto Rico declined to entertain the appeal of the Judgment of the Superior Court for want of a substantial constitutional question, thus affirming the validity of Section 8 of the Games of Chance Act.

The case comes now before this Honorable Court on appeal from the Judgment of the Supreme Court purporting to have been taken under 28 U.S.C. 1258(2). That pro-

vision authorizes an appeal from "final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico" when "the validity of a statute of the Commonwealth of Puerto Rico" is drawn in question "on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and "the decision is in favor of its validity."

In the present case, even assuming, *arguendo*, that the validity of Section 8 of the Games of Chance Act under the Constitution of the United States was properly and timely raised or, that it was considered and decided by the courts of the Commonwealth of Puerto Rico, sustaining its validity, the appeal in this case shall be dismissed because it does not present a substantial federal question.

### B. No Substantial Federal Question

There is no doubt that the Legislative Assembly of the Commonwealth of Puerto Rico has the inherent power to enact legislation. That power is subject only to the limitations imposed by the Constitution of the Commonwealth of Puerto Rico and its Bill of Rights, which Congress determined was not inconsistent with the applicable provisions of the Constitution of the United States and with those obligations which the people of Puerto Rico imposed on itself in accepting the federal relations which were to exist and do exist with the United States pursuant to Act No. 600 of July 3, 1950, 64 Stat. 314.<sup>1</sup>

Whenever those limitations are honored by the Legislature, under the system of government created by the Constitution of the Commonwealth of Puerto Rico, it is up to the legislative power, not to the courts, to decide on the wisdom and utility of a specific legislation. As pointed out

<sup>1</sup> *R.C.A. v. Government of the Capital*, 91 P.R.R. 404, 415-416 (1964).

by this Honorable Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

"We have returned to the original constitutional proposition that the courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws."

The legal provision that Posadas challenges in this case is part of an Act approved by the Legislature following a specific public purpose that is clearly stated in its Statement of Motives, and in the different provisions of that Act.

In the Statement of Motives of the Games of Chance Act of 1948, *supra*, it is expressed that:

"The purpose of this Act is to *contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by the establishment of regulations for and the strict surveillance of said games by the government*, in order to ensure for tourist the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income." Laws of Puerto Rico, Fourth Regular Session of the Sixteenth Legislature of Puerto Rico (1948 p. 750).

In Section 2 of that Act it is established the following:

"Notwithstanding the provisions of Sections 299, 300, 301, 302, 303 and 304 of the Penal Code of Puerto Rico, there are hereby authorized *the games of chance of roulette, dice and cards in gambling rooms operated under a license issued in accordance with the provisions of this Act, subject to the conditions and limitations of this Act and of the regulations prescribed*

<sup>2</sup> See also *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 505 (1981).

hereunder." Laws of Puerto Rico. Fourth Regular Session of the Sixteenth Legislature of Puerto Rico, 1948 page 750.

And Section 8 of the same Act, the provision challenged in this case, established that:

"No gambling room shall be permitted to advertise or otherwise offer their facilities *to the public of Puerto Rico*; or to admit persons under eighteen years of age." Emphasis supplied.

The above mentioned provisions of the Games of Chance Act, *supra*, clearly show that:

1. When the legislation was proposed for approval the games of chance were absolutely prohibited by the Penal Code of Puerto Rico.
2. Some of those games of chance, as an exception, were authorized in 1948, but only in gambling rooms in the hotels in the tourist centers, and under the strict government regulations and surveillance.
3. That the basic and fundamental purposes of the legislation was to promote the development of tourism and at the same time to open to the Treasury of Puerto Rico an additional source of income.
4. The increase of tourism by the authorization of certain games of chance in the gambling rooms of the hotels in the tourist centers of Puerto Rico leads to the increase of the income of the Treasury because tourists spend and leave in Puerto Rico money with sources out of Puerto Rico.
5. On the other hand if the public of Puerto Rico is encouraged to go to the gambling rooms it neither contributes to the development of tourism because the people of Puerto Rico are not tourists in Puerto Rico, nor provides an additional source of income because

as a general rule the source of the income of the people of Puerto Rico is Puerto Rico itself.

6. For those reasons the Legislature of Puerto Rico, in order to comply with the public purpose of the Games of Chance Act, discouraged the flowing of the public of Puerto Rico into the gambling rooms, by providing that those gambling rooms shall not be permitted to advertise or offer their facilities to the public of Puerto Rico.

The Games of Chance Act, supra, was amended by Act No. 2 approved on July 30, 1974 to authorize the introduction, possession, use and operation of Slot Machines.

In the Statement of Motives of Act 2 of 1974, supra, it was expressed that:

"Likewise, it states as a matter of public policy, *that the basis of the tourist attraction to Puerto Rico is and shall continue being its extraordinary natural beauty, with special attention to its beaches, historical places and the charms of its people. Legal gambling at casinos is only an additional and secondary attraction offered to our visitors . . . This act amending the one authorizing games of chance in Puerto Rico keep in full force the provisions establishing methods of greater purity and guarantee for the operation of games of chance in casinos authorized by law. The public policy as to games of chance is to discourage and prohibit illegal and immoral practices related thereto; to regulate their operation with the most severe rules of fairness and honesty practiced by casino croupiers.*" (Emphasis supplied) Laws of Puerto Rico, 1974, Part 2, Seventh Legislature, Acts and Resolutions of the Fourth Special Session, pages 589-590.

In the joint report of July 20, 1974 of the House of Representatives Standing Committees on Commerce and Industry, Finance, Government, Labor and Veterans Affairs, and Penal Juridical regarding the Senate Bill No.

833<sup>3</sup> which lately became Act No. 2 supra, it was stated as follows on page 17:

"We do reiterate that the basis of tourist attraction to Puerto Rico is and will continue being the natural beauty of the Island, specially its beaches, its historical sites and its people. *Legalized games of chance should be an additional attraction but less important.*" (Emphasis supplied) A. 1.

And on page 18 of the aforementioned report it was pointed out that:

"*Another factor of great weight for recommending the approval of this Bill is the conviction of the scarce flow of Puerto Ricans to the casinos which are the only places where these machines will be operational.*" (Emphasis supplied).

The same public policy was ratified on Act No. 13 approved on June 26, 1980<sup>4</sup> and Act No. 1 of July 30, 1982,<sup>5</sup> extending the effectiveness of the operation of the Slot Machines. In the Statement of Motives of both acts it was expressed that it is the public policy of the Government of Puerto Rico to discourage games of chance and to stimulate the attitude of the individuals to obtain income based on their efforts and work.<sup>6</sup>

<sup>3</sup> An official translated copy of the pertinent parts of that report is included as Appendix A to this response.

<sup>4</sup> An official translated copy of the pertinent part of the House of Representatives' report dated May 15, 1980, regarding the Senate Bill No. 1369 that lately became Act No. 13 of June 26, 1980, is included as Appendix B.

<sup>5</sup> An official translated copy of the pertinent part of the joint report to the Senate Bill No. 663, dated July 28, 1982, which lately became Act No. 1, July 30, 1982, is included in the Appendix B.

<sup>6</sup> See Laws of Puerto Rico 1980, Eight Legislature Acts and Resolutions of the Eighth Special Session page 895 and Laws of Puerto Rico 1982, Ninth Legislature Acts and Resolutions of the Fourth Special Session page 213.

The public policy framing the Games of Chance Act has been upheld by the Supreme Court of the Commonwealth of Puerto Rico.

In *Irizarry v. Villanueva*, 70 P.R.R. 71 (1940), the Supreme Court of Puerto Rico pointed out that:

*"The Legislature is empowered to prohibit games of chance and in prohibiting them, to make exceptions and authorized that the same be established and operated provided certain requisites are complied with. Exceptions of this kind should be strictly construed and must be fully complied with in order that they may be restored to."* Emphasis supplied.

In *Serra v. Salesian Society*, 84 P.R.R. 311 (1961) the Supreme Court of Puerto Rico emphasizes that games of chance are prohibited in Puerto Rico and that only some are permitted by way of exceptions, and that *"in these cases the Legislative Assembly has had reasons of public policy to do so."* Emphasis supplied.

In *United Hotels of P. R. v. Willig*, 89 P.R.R. 185 (1963), the Supreme Court of Puerto Rico analyzes the scope of the public policy of the Legislature of the Commonwealth of Puerto Rico as to the games of chance. The Supreme Court pointed out that:

*"On this question of games of chance the general rule underlying our legislation is that games of luck or chance are prohibited, but, naturally, they are prohibited by law, which means that also by law there may be, and there are exceptions to that rule. The Penal Code prohibits in § 299*

*"any game of chance played with cards, dice or any device," 33 L.P.R.A. § 1241, and the Civil Code in § 1699 provides that "bets analogous to prohibited games are considered as prohibited," 31 L.P.R.A. § 4772. The law also prohibits lotteries or raffles, "bolita," "bolipoo," and other variants of those games, 33 L.P.R.A., §§ 1211-59.*

*As exceptions to the general rule mentioned, the law permits bingos for charity or educational purposes in churches and lodges, 15 L.P.R.A. §§ 151-57, creates an official lottery, part of the net proceeds of which is covered into the public treasury and part into the municipalities, 15 L.P.R.A. §§ 111-28, and by Act No. 221 of May 15, 1948 games of chance are authorized in gambling rooms operated under a license issued in accordance with the provisions of that Act, 15 L.P.R.A., §§ 17-84.*

Act 221 and the regulations promulgated hereunder impose strict conditions and regulations and stringent surveillance by the government for the granting and operation of gambling rooms. The licenses are issued by the Secretary of the Treasury after approval by the Economical Development Administration. The licensees must own and operate a hotel, restaurant, or amusement place for tourists;<sup>1</sup> must not have been convicted of a felony or misdemeanor involving moral turpitude; must enjoy a good standing, and if they are artificial persons, all the stockholders or partners must also comply with these personal requirements. The applications for license shall be made under oath showing that they meet the requirements of law, and there shall be published in a newspaper of general circulation in Puerto Rico, once a week for four weeks, a notice stating the fact of the application, the name of the applicant and of the hotel or place where the gambling room is to be operated.

The license is nontransferable. The acquirer or lessee of a gambling room shall apply for new license and comply with the legal requirements. If the licensee is an artificial person, any transfer of any share or interest therein shall be notified in writing to the Secretary of the Treasury and to the Development Administration. Failure to give such notice or the concealment of the true owner or owners of a gambling room, or of any share or participation in the artificial person hold-

<sup>1</sup> Act 2 approved on July 2, 1974, limited the power to grant a license for the operation of gambling rooms to the hotels exclusively.

ing the license, shall entail the cancellation of the license.

The Development Administration inspectors have free access to the gambling room, its equipment and its books, 15 R. & R.P.R. § 76-16, and the gambling rooms are under the duty to furnish to the Economic Development Administrator any information which the latter may request in connection with the gambling rooms, their operation, their employees, their owners and stockholders, 15 R. & R.P.R. § 76a-1(6).

*Gambling rooms are not permitted to advertise to the public or to admit persons under 18 years of age.* In the different games the regulations establish a limit for the bets; the Regulations of the Economic Development Administration divide the Island into several zones and prescribe the requirements of investment which the applicants must make to warrant a license, in addition to complying with the legal requirements and regulations, and they determine the annual fees which the gambling rooms shall pay to the State for their operation. The Regulations of the Economic Development Administration referred to above, 15 R. & R.P.R. §§ 76-1 to 76-22, and the Regulations of the Secretary of the Treasury, 15 R. & R.P.R. §§ 76-201 to 76-219, exist by operation of the law.

Every day that the gambling parlor is open to the public every licensee must have a sum of not less than \$25,000 in cash and ready money in its vault. 15 R. & R.P.R. § 76-21, and the cashier shall redeem the chips to the bearer in legal tender, 15 R. & R.P.R. § 76a-7(d).

The foregoing are not all the conditions and requisites which the law and the regulations require of the casinos, but only some which we have selected to show the fiscalization to which these enterprises are subjected by the State.\* Emphasis supplied."

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\* Powers and duties granted to the Economic Development Administration were lately transferred to Puerto Rico Tourism Company by Act 10 of June 18, 1970, as amended.

The preceding discussion shows that the provision of the Games of Chance Act, *supra*, prohibiting the advertising of the gambling rooms to the public of Puerto Rico is a restriction carefully and wisely designed by the Legislature of Puerto Rico to achieve the state's goal of discouraging games of chance in Puerto Rico and of authorizing them only as an exception and with a specific purpose, such as that of contributing to the development of tourism and at the same time opening additional sources of income for the Treasury of Puerto Rico. This is a matter of pure local law that does not involve a substantial federal question.

As it has been stated before it is not the function of the courts to substitute their criteria as to the wisdom and social utility of a specific legislation for that of the legislature.

Furthermore, it has been repeatedly held by this Honorable Court that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous," which is not the situation in this case.<sup>9</sup>

The foregoing analysis of the background of the public policy behind the legislation regarding games of chance in Puerto Rico, shows that the Commonwealth of Puerto Rico is not precluded from enacting and enforcing that legislation and that the present appeal should be dismissed and the decision of the Supreme Court of Puerto Rico, concluding that this case does not involve a substantial federal question, should be affirmed.

Nonetheless, the appellees will pass over the issues raised by Posadas in order to clarify beyond any doubt that no substantial federal question is present in the case.

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<sup>9</sup> *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *De Castro v. Board of Commissioners*, 322 U.S. 451 (1944); *Sancho Bonet v. Texas Co.*, 308 U.S. 463 (1940).

### C. Points Raised on Appeal

The points raised by Posadas are the following:

1. That Section 8 of the Games of Chance Act of the Commonwealth of Puerto Rico, Act 221 of May 15, 1948, as amended (15 L.P.R.A. Sec. 77), is vague and does not meet the constitutional standards for definiteness and clarity on its face.

2. That Sec. 8 of the Games of Chance Act (15 L.P.R.A., Sec. 77) violates Posadas right to commercial speech.

3. That Sec. 8 of the Games of Chance Act (15 L.P.R.A., Sec. 77) violates Posadas right to the equal protection of the law.

Appellees very respectfully disagree with Posadas contentions for the reasons stated henceforth.

#### 1. Definiteness and Clarity of Sec. 8 of the Games of Chance Act (15 L.P.R.A. Sec. 77)

In *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1981) this Honorable Court stated the following as to the factors to be considered for determining whether a legal provision is vague or not:

"The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972);

'Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant

*dangers of arbitrary and discriminatory applications'* (Footnotes omitted).

These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. *Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action . . .*"

Emphasis supplied. Footnotes omitted.

Section 77 of 15 L.P.R.A. provides that:

"No gambling room shall be permitted to advertise or otherwise offer their (sic) facilities to the public of Puerto Rico or to admit persons under eighteen years of age."

The specific language of the above quoted legal provision is crystal clear to a person of ordinary intelligence. It specifically prohibits the advertising of gambling rooms to the people of Puerto Rico, not to the tourists or to the public of other countries. If it is clear to the ordinary person, it is even more clear to the businessmen of ordinary intelligence in charge of the gambling rooms, who must be conscious of that ban in advance of requesting the grant of the license to operate the gambling rooms. It cannot either be said that Sec. 8 of the Games of Chance Act, *supra*, is substantially overbroad because it only prohibits the advertising of the gambling rooms to the people of Puerto Rico, and is exclusively directed to the operators of the gambling rooms.

The legislature of Puerto Rico is not delegating any basic policy matter to the officials in charge of the enforcement of that provision of the Games of Chance Act. The basic policy of the Act is to encourage the development of tour-

ism and to open an additional source of income to the Treasury of Puerto Rico, but at the same time discouraging the flowing of the public of Puerto Rico into the gambling rooms.

Ultra vires acts or the excess in the exercise of the powers that the persons in charge of enforcing a law have, is always possible either in clear and specific laws or in vague laws. In those cases, it is the function of the courts to analyze the situation and determine the validity of those actions. But a law with a precise language and a clear legislative purpose, like the one challenged herein, cannot be declared unconstitutional because of an incidental error or excess in its application.<sup>10</sup> For that reason the Superior Court of Puerto Rico correctly found that Section 8 of the Games of Chance Act, *supra*, is constitutional and the Supreme Court of Puerto Rico was also correct in dismissing the case for want of a substantial constitutional question.

## 2. Constitutionality of Sec. 8 of the Games of Chance Act (15 L.P.R.A. Sec. 77) Under the Constitutional Right to Commercial Speech

It was not until 1976 that this Honorable Court recognized the commercial speech as constitutionally protected.<sup>11</sup>

Thereafter, in *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), this Court held that:

<sup>10</sup> *Hoffman States v. Flipside*, *supra*, and cases cited therein; *Board of Governors v. Agnew*, 329 U.S. 441 (1949); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Cotton Mills v. Administrator*, 312 U.S. 126 (1941); *Roschen v. Ward*, 279 U.S. 337 (1929).

<sup>11</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

"The Constitution . . . accords a lesser protection to commercial speech than to constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." This ruling was reiterated in *Bolger v. Young Drug Products Corp.*, 51 L.W. 4961 (1983).

Furthermore, this Court clarified the status of commercial speech by articulating a four-part test. This Court pointed out in *Central Hudson*, *supra*, that:

"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

After the ruling of *Central Hudson Gas and Electric Corp. v. Public Service Commission*, *supra*, several laws regulating the aspect of commercial speech have been upheld either by this Court and other courts.<sup>12</sup>

Following the approach articulated in the *Central Hudson* case, *supra*, we have the following:

<sup>12</sup> *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Queensgate Investment Corp. v. Liquor Control Commission*, 103 S. Ct. 31, dismissing appeal from 69 Ohio St. 2d 361, 433 N.E. 2d 138 (1982) (per curiam). *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (1983) (en banc); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, cert. granted sub nom. *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 66 (1983); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981) (per curiam).

We can assume, for argument purposes, that the prohibition of Section 8 of the Games of Chance Act, as amended, involves commercial speech. We can also assume that the advertising to the public of the authorized gambling rooms involves lawful activity and that it is not misleading. There could be no doubt that the legislature goals of the Games of Chance Act (as amended in 1974, 1980 and 1982) seeks to further (namely, to contribute toward the development of tourism, to afford the Treasury of Puerto Rico an additional source of revenue and to discourage the flowing of the public of Puerto Rico into the gaming rooms), are substantial governmental goals.

Having positive answers to the two first inquiries of the four-part test of *Central Hudson*, supra, it must be determined whether the prohibition of Section 8 of the Games of Chance Act advances the governmental goals and whether it is not more extensive than is necessary to serve those goals.

At the outset, the restriction contained in Section 8 of the Games of Chance Act, supra, implies that the operators of the gambling rooms are entitled to advertise those gambling rooms to the tourists and to the public of the whole world. That advertising promotes the interest of tourists in coming to Puerto Rico, at least among the persons who enjoy gambling. At the same time if the flowing of tourists to Puerto Rico is increased it produces an additional source of income for the Treasury of Puerto Rico.

On the other hand, the Legislature of Puerto Rico has the reiterated public policy or public interest in discouraging the flowing of the public of Puerto Rico into the gambling rooms. It is known that the advertising business is very advanced with scientific techniques aimed to obtain proposed specific conducts from the people. Psychology is used as part of the advertising business in order to stimulate the individuals to do what the advertising aims to

promote. The flowing of the public of Puerto Rico into the gambling rooms does not contribute to the development of tourism because as it has been already pointed out, the people of Puerto Rico are not tourists in Puerto Rico. To avoid the flowing of the public of Puerto Rico into the gambling rooms the common-sense judgment of the Puerto Rican lawmakers considered appropriate a ban on the advertising of the gambling rooms to the public of Puerto Rico. That restriction is not more extensive than is necessary to serve the lawmakers' goals. On the contrary, that is a reasonable advertising ban that directly advances the purpose of discouraging the flowing of the public of Puerto Rico into the gambling rooms without affecting the right of the gambling rooms operators of encouraging the flowing of tourists into the gambling rooms of Puerto Rico by advertising them to the tourists and to the public of the rest of the world. Far broader bans on advertising have been upheld by this Honorable Court and circuit courts.<sup>12</sup>

The precedent analysis under the balancing test of *Central Hudson* case, supra, shows that the reasonable restriction of Section 8 of the Games of Chance Act directly advances the substantial interests asserted in the Games of Chance Act. Thus the balance shifts in the favor of the appellees herein.

Posadas presses the point that the gambling rooms are legal in Puerto Rico and that for that reason their right to commercial speech cannot be restricted. It is true that the

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<sup>12</sup> *Queensgate Investment Corp. v. Liquor Control Commission*, supra; *Oklahoma Telecasters Association v. Crisp*, supra; *Dunagin v. City of Oxford, Mississippi*, supra. In *Dunagin* the Fifth Circuit, sitting en banc, upheld the constitutionality of Mississippi statutes and regulations that banned liquor advertising on billboards, in print, and through broadcast media originating within the state, concluding that the advertising ban directly advanced Mississippi's interest in controlling the consumption of alcohol.

gambling rooms authorized to operate in Puerto Rico under the restriction imposed by the Games of Chance Act are legal. Nonetheless, since long ago suppressions of gambling have been upheld by the judicial power.<sup>14</sup> If the states are empowered to suppress gambling they are also empowered to reasonably regulate and control that activity once authorized. In other words, although an activity could be lawful it does not mean that it cannot be subject to reasonable restrictions. To be legal does not mean to be free of reasonable restrictions. Among those reasonable restrictions are the bans on advertising. Even truthful advertisements can be restricted if doing so serves a substantial

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<sup>14</sup> In *Parkes v. Bartlett*, 210 N.W. 492 (1926), it was stated that as a member of organized society, the individual citizen has no right to do those things which are injurious to the common welfare. He is wisely fenced about by governmental limitations which prevent him from infringing upon the rights of the public. *There are no constitutional guarantees which he can invoke against reasonable restraints imposed by the Legislature in the exercise of its police power for the preservation of the health, morals, and safety of the community. Gambling is injurious to the morals and welfare of the people. Therefore it is the duty of the state and is within the scope of its police power to suppress it. And in enacting legislation for that purpose, there is no invasion of constitutional rights unless the restraints imposed are unreasonable. So that in considering the constitutionality of §4 of the statute in question, we may begin with the assumption that legislation to suppress gambling and to prohibit the publication that would have tendency to induce people to practice it is well within the scope of the police power of the state. It is a proper subject for proper legislation, and it is not unconstitutional merely because it restricts the liberty of citizens. The principal test as to its validity is whether it is a reasonable exercise of such power. The Court also added that the police power of the state extends only to such measures as are reasonable, and the general rule is that all police regulations must be reasonable under all circumstances.*

governmental interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm. of N. Y.*, supra; *Oklahoma Telecasters Association v. Crisp*, supra; *Queensgate Inc. Co. v. Liquor Control Comm'n*, supra; *Dunagin v. City of Oxford, Mississippi*, 718 F.2d page 738 (1983) (en banc); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981) (per curiam).

### 3. Constitutionality of Sec. 8 of the Games of Chance Act (15 L.P.R.A. Sec. 77) Under the Constitutional Right to Equal Protection of Law

Posadas contends that Sec. 8 of the Games of Chance Act, supra, infringes its rights to equal protection of law because it restrains the advertising of the casinos or gambling rooms to the people of Puerto Rico, but in the laws regulating the state-operated lottery, cockfights and horse-races it is not prohibited the advertising of those activities.

The Constitution of the United States does not impede the states from making reasonable classification of persons, properties, corporations, activities, places or other objects for a public purpose. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). It has been established that the equal protection clause does not impose to the states a rigid rule in the classification of the subjects of their legislation. *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1936).

Furthermore it has been settled that upon creating classes the action of the legislative power should be presumed valid, *Rapid Transit v. New York*, 303 U.S. 573 (1937). Thus Posadas had the burden of establishing that the classification that it challenges is unconstitutional. *Charleston Ass'n v. Anderson*, 324 U.S. 182 (1944).

Since long ago this Honorable Court ruled that the equal protection clause of the Constitution of the United States does not secure same laws and remedies either in different

States or throughout same state, but only that all persons shall be given same protection of laws enjoyed by others in same place and under like circumstances, *Missouri v. Lewis*, 101 U.S. 22 (1880). It has also been established by this Court that legislation which, in carrying out a public purpose, is limited in its application, and which within the sphere of its operation it affects alike all persons similarly situated, is not contrary to the equal protection clause. *Barbier v. Connolly*, 113 U.S. 27 (1885); *Hayes v. Missouri*, 120 U.S. 68 (1887); *Watson v. Nevis*, 128 U.S. 578 (1888); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Southern R. Co. v. Greene*, 216 U.S. 400 (1910). Those rulings have been ratified more recently by this Honorable Court. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Wash. v. Louisiana High School Athletic Assoc.*, 616 F.2d 152 (1980), reh. den. 621 F.2d 440 and cert. den. 449 U.S. 1129.

In the present case the provision challenged as allegedly unconstitutional is Section 8 of Act No. 221 of May 15, 1948 as amended (15 L.P.R.A. § 77). Act No. 221, supra, authorized some games of chance in gambling rooms operated under license issued in accordance with the provisions of that Act. The objects of the Act No. 221, supra, are the persons authorized to operate the gambling rooms. Under Sec. 8 of Act No. 221, supra, all the objects of the legislation (the operators of the gambling rooms) are treated alike, under like circumstances and conditions. Under those circumstances, equal protection cannot be said to be denied because the ban on advertising is applied equally to all the operators of gambling rooms.

Posadas contends that its right to equal protection of law is violated because no ban on advertising is applicable to other different kinds of games of chance authorized by other statutory provisions.

But the legislature is empowered to make reasonable classifications and to authorize, as exceptions, different

kinds of games of chance with different limitations, according to the public interest involved in the specific legislation.

Under the traditional minimum or rational nexus standard for the analysis of the equal protection of laws, the one applicable to commercial activities,<sup>18</sup> a Legislative classification must have a rational relation with a legitimate state interest. *Eisestadt v. Baird*, 405 U.S. 438 (1972); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Tribe*, supra, § 16-2; *Bice*, supra, pp. 689, 698 (1977).

The argument in the precedent pages clearly shows that the restriction on advertising of the gambling rooms has a rational relation with the legitimate public interests of the Games of Chance Act as amended, supra. Thus the right of Posadas to the equal protection of the laws is not violated by Sec. 8 of the Games of Chance Act as amended.

## CONCLUSION

Since the present case does not present a substantial federal question and only presents a matter of local law, it is respectfully requested from this Honorable Court to dismiss this appeal and summarily affirm the decision below.

<sup>18</sup> There are three standards in constitutional analysis of the equal protection of laws: the traditional minimum or rational nexus standard; and strict scrutiny standard and the intermediate. *Craig v. Boren*, 429 U.S. 190 (1976); *Tribe*, *American Constitutional Law*, § 16-2, 16-6, 16-30, The Foundation Press, N.Y. 1978; *Bice*, *Standards for Judicial Review Under the Equal Protection and Due Process Clauses*, 50 Cal. L. Rev. 689 (1977).

San Juan, Puerto Rico, September 30, 1985.

Respectfully submitted,

HECTOR RIVERA CRUZ  
*Attorney General*

\*REINA COLON DE RODRIGUEZ  
*Assistant Solicitor General*  
Box 192  
San Juan, Puerto Rico 00902  
Phone (809) 721-2900, Ext. 304

JUAN A. CORREA SUÁREZ  
Puerto Rico Tourism Company  
Box 4435  
Old San Juan Station  
San Juan, Puerto Rico 00905  
Phone (809) 721-2400, Ext. 267  
*Attorneys for Appellees*

\**Counsel of Record*

## APPENDIX

## APPENDIX A

*Certified Translation*

Excerpt from pages 17 and 18 of the Joint Report to the House of Representatives dated July 20, 1974 regarding SB 883.

"We do reiterate that the basis of tourist attraction to Puerto Rico is and will continue being the natural beauty of the Island, especially its beaches, its historical sites and its people. Legalized games of chance should be an additional attraction but less important."

"Another factor of great weight for recommending the approval of this Bill is the conviction of the scarce flow of Puerto Ricans to the casinos which are the only places where these machines will be operational."

United States District Court  
For the District of Puerto Rico

— CERTIFIED —

To be a correct translation prepared by:

/s/ ANA LOUISA NAVARRO

Certified Court Interpreter  
Administrative Office of the  
United States Courts

## APPENDIX B

*Certified Translation*

Excerpt from pages 2 and 3 of the report of the House of Representatives dated May 15, 1980 regarding SB 1369.

"Since Law No. 2 of July 2, 1974 was approved with its subsequent amendment by Law No. 5, of June 16, which legalized the use of slot machines in Puerto Rico, public policy regarding the tourist attraction to the Island was established. The same has as its basis its natural beauty, giving special attention to its beaches, its historical sites and the charm of its people. The Legislative Assembly stated, in the statement of objectives for these laws, that the objective of the legalization of the use of slot machines in Puerto Rico was in order to provide economic relief to the Hotel industry while a long term plan was formulated for the revitalization and stabilization of said industry. In the legislation that we are considering today, it is clearly established that the public policy of the Government of Puerto Rico is to discourage games of chance and to encourage the attitudes of persons towards obtaining income on the basis of their effort and labor."

Excerpt from the Joint Report to the Senate dated July 28, 1982 regarding SB 663.

"However, and as a question of public policy, it should be stated that the basis for tourist attraction to Puerto Rico is and will continue being its natural beauty along with its beaches, historical sites and the charm of its people."

United States District Court  
For the District of Puerto Rico

— CERTIFIED —

To be a correct translation prepared by:

/s/ ANA LOUISA NAVARRO

Certified Court Interpreter  
Administrative Office of the  
United States Courts

# **JOINT APPENDIX**

(1)  
No. 84-1903

Supreme Court, U.S.

F I L E D

DEC 12 1985

JOSEPH F. SPANIOLE, JR.  
CLERK

IN THE

# Supreme Court of the United States

October Term, 1985

POSADAS DE PUERTO RICO ASSOCIATES, d/b/a Condado Holiday Inn,  
*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO,  
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

## JOINT APPENDIX

MARIA MILAGROS SOTO

Banco Central Building

Suite 815

221 Ponce de Leon Avenue

Hato Rey, PR 00917

(809) 754-1920/1717

*Counsel for Appellant*

JUAN M. CORREA SUAREZ

*Attorney for Appellee*

Box 4435

Old San Juan Station

San Juan, PR 00905

(809) 721-2400

HECTOR RIVERA CRUZ

*Attorney General*

REINA COLON DE RODRIGUEZ

*Assistant Solicitor General*

Box 192

San Juan, PR 00902

(809) 721-2900

*Attorneys for Appellee*

BEST AVAILABLE COPY

Jurisdictional Statement Filed June 4, 1985

Leave to Appeal Granted October 21, 1985

733142  
1-6-86

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# **Notation to the Honorable Justices of the U. S. Supreme Court**

The following opinions, judgments, resolutions and orders, have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Jurisdictional Statement:

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*Notation to the Honorable Justices of the U. S. Supreme Court*

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**Chronological List of Relevant Docket Entries**

March 12, 1982, 3:44 p.m.—Plaintiff's Complaint of Declaratory Judgment was filed in the Superior Court, San Juan Section, of the Commonwealth of Puerto Rico.

June 22, 1982—Defendants Answer to the Complaint filed.

November 15, 1982—Secretary of Justice of Puerto Rico's Motion Requesting Leave to Intervene.

December 14, 1984—Notice of Declaratory Judgment issued by the Superior Judge, Guillermo Arbona Lago on December 12, 1984.

January 14, 1985, 4:21 p.m.—Notice of Appeal filed in the Superior Court, San Juan Section.

January 12, 1985, 5:07 p.m.—Informative Motion of Notice of Appeal, filed with the Clerk of the Puerto Rico Supreme Court.

January 28, 1985—Trial Court's Record was filed in the Puerto Rico Supreme Court.

February 11, 1985—Supreme Court Clerk's Notification of the Court's Resolution of February 7, 1985, dismissing the Writ of Appeal.

February 22, 1985, 1:40 p.m.—Plaintiff's Motion of Reconsideration.

March 11, 1985—P. R. Supreme Court Clerk's Notification of the Court's Resolution of March 7, 1985, denying Rehearing.

*Chronological List of Relevant Docket Entries*

March 18, 1985—P. R. Supreme Court Clerk's Notification of Mandate to the Superior Court dated March 15, 1985.

March 29, 1985—Simultaneous filing of Notice of Appeal to the Supreme Court of the United States; at 2:56 p.m. before the Puerto Rico Supreme Court and at 4:16 p.m. before the Superior Court.

April 15, 1985—P. R. Supreme Court Clerk's Notification of April 11, 1985 Resolution Acknowledging Appeal.

June 4, 1985—Jurisdictional Statement filed before the United States Supreme Court.

October 21, 1985—U. S. Supreme Court Order Granting the appeal, postponing the jurisdiction question until full hearing on the merits.

*Sworn Statement*

I, AIDA TORRES, of legal age, married, Federally Certified Translator, and a resident of San Juan, Puerto Rico, under oath hereby state:

1. That I have been certified by the United States Court as a translator.

2. That I have translated from the Spanish language into the English language all the documents in the Joint Appendix that appear identified as "translations" to be used in the United States Supreme Court in Case #84-1903.

3. That I certify that all the translated documents are a true and correct translation of the original documents as appear in the record of the Superior Court, San Juan section.

WHEREFORE, for all legal and procedural purposes, I issue this Sworn Certification in San Juan, Puerto Rico, this 29 of November, 1985.

AIDA TORRES

Affidavit #131:

Sworn and subscribed to before me by Aida Torres of the above described personal circumstances, whom I personally know, in San Juan, Puerto Rico this 29 of November, 1985.

SONSIRE RAMOS  
Notary Public

(Seal.)

**[R46] Administrative Interpretative Ruling on Advertising Issued by the Tourism Company on February 16, 1979 (Translation) -**

[Letterhead of Tourism Company of Puerto Rico omitted in Printing]

February 16, 1979

**MEMORANDUM**

**TO :** All General Managers of Hotels  
Franchise Holders for the Operation  
of a Gaming Room

**FROM :** Pedro de Aldrey  
Subdirector

**SUBJECT :** ADVERTISEMENTS OF GAMING  
ROOMS WITHIN AND WITHOUT  
PUERTO RICO

Act Number 221 of May 15, 1948, as amended, empowers the Tourism Company to regulate everything related to legalized games of chance in Puerto Rico.

It is through the Gaming Department of the Tourism Company of Puerto Rico that said Act and Regulation fiscalizing and supervising the operation of everything related to games of chance and enforcing the applicable laws and regulations in effect, is implemented.

Section 8 of Act 221 (15 LPRA 77) provides the following:

Section 77—Advertisement or the admission of minors under 18 years of age, is forbidden.

*Administrative Interpretative Ruling on Advertising Issued by the Tourism Company on February 16, 1979 (Translation).*

“A gaming room will not be allowed to advertise or offer itself to the public in Puerto Rico in any manner whatsoever, nor to admit minors under eighteen years of age.”

Section 9 of Act 221, *supra* (15 LPRA 78) empowers the Secretary of the Treasury, as well as the Tourism Company, to administratively punish violations to its orders and regulations with a fine which shall not exceed five hundred dollars (\$500) or with a temporary suspension or revocation of the rights and privileges which said natural or juridical person guilty of the violation enjoys in the operation of the games. The resolution made by the Secretary of the Treasury or by the Tourism Company of permanently cancelling or temporarily suspending the franchises, licenses, rights and privileges which any natural or juridical person presently enjoys under the Gaming Act, Rules and Regulations and/or administrative orders, shall be final and unappealable.

In view of all of the above, the Tourism Company of Puerto Rico has reviewed this matter, at the request of several hotels, and after the corresponding legal study it reaffirms itself in its public policy of prohibiting the announcement or advertising of the gaming rooms (casinos) which legally operate in Puerto Rico, in any manner whatsoever.

This prohibition includes the use of the word “casino” in matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, plates, lobbies, banners, flyers, paper holders, pencils, telephone books, directories, bulletin boards or in any hotel dependency or object which may be accessible to the public in Puerto Rico.

*Administrative Interpretative Ruling on Advertising Issued  
by the Tourism Company on February 16, 1979 (Trans-  
lation)*

With respect to the advertising of our gaming rooms outside of Puerto Rico, be it by radio, television, movie, magazines, newspapers and/or any other publicitary media, it should be with the previous authorization and approval of the Tourism Company regarding the wording of said advertisement, which must be submitted in draft form to the Tourism Company.

I hope this clarifies any doubts which may exist as to the publication of advertisements of casinos in Puerto Rico, and if any doubt should arise in the future, I would appreciate your consulting the Gaming Department before taking any action whatsoever.

cc: Puerto Rico Hotel Association

**[R41] Answer to the Complaint and Its Exhibit 1, Dated  
June 22, 1982 (Translation).**

IN THE SUPERIOR COURT OF PUERTO RICO SAN  
JUAN SECTION

—————●—————  
POSADAS DE PUERTO RICO ASSOCIATION d/b/a/  
Condado Holiday Inn Hotel

*Petitioner,*

vs.

PUERTO RICO TOURISM COMPANY,

*Defendant.*

Civil No. 82-1508 (908)

RE: DECLARATORY JUDGMENT

—————●—————  
ANSWER TO THE COMPLAINT

TO THE HONORABLE COURT:

Comes now defendant through its undersigned attorneys and respectfully states the reasons why a Declaratory Judgment should not be issued.

1. The public policy of Act 221 of May 15, 1948 (Games of Chance Act of Puerto Rico), as amended, contemplates,

*Answer to the Complaint and Its Exhibit 1, Dated June 22, 1982 (Translation)*

according to the legislative history, the operation of gaming rooms duly fiscalized by the Puerto Rico Tourism Company.

2. The constitutional rights of the concessionaires, protected by the First Amendment of the Constitution of the United States and of Puerto Rico are not violated, since the law in question is constitutionally valid the delegation of powers to regulate the prohibition to advertise was stated by the legislator (See Acts of the Senate of Puerto Rico—Tuesday, April 12, 1948, page 648).

The Supreme Court of the United States has stated in innumerable occasions that the freedom of expression and to advertise guaranteed by the Federal Constitution and by those of the states has its limitations. The freedom is not an absolute one (*Near v. Minnesota*, 283 US 697, *Stromberg v. California*, 283 US 359). The unconditional phrasing of the first amendment does not imply that a specific freedom of expression is protected (*Roth vs. US*, 354 US 476, *Poulos v. New Hampshire*, 345 US 395). The first amendment does not grant an absolute right to freedom of verbal or written expression without any responsibility (*Branzburg v. Hayes*, 408 US 665).

In addition, it is an established doctrine that freedom of oral and written expression may be subject to legislative limitations when the same bear relation to a valid public interest (*Valentine v. Christensen*, 316 US 52, *Konigsberg v. State Rd. of California*, 366 US 36).

3. There is a substantial public interest to limit the freedom of expression so that the gaming rooms are not advertised since the legislator desired a fiscalization, based on the safety and purity of the operation of same (Exposition

*Answer to the Complaint and Its Exhibit 1, Dated June 22, 1982 (Translation)*

of Motives, Section 7, Act 221 of May 15, 1948). The guarantee of safety to the tourist of not being harassed by persons adverse to the interests of the casinos; attracted by publicity oriented to limitless sponsorship, prompted the legislator to expressly prohibit advertising the gaming rooms to the public in Puerto Rico. The spirit of the law is one of maximum governmental regulation. Within that spirit of fiscalization is that the Tourism Company regulates and subsequently forbids any type of advertising.

The prohibition against advertising the gaming rooms is one intimately related to the governmental public policy process of discouraging games of chance in Puerto Rico as a sole measure to attract tourism to the Island and not to promote it locally (Exposition of Motives, Act No. 13 of June 26, 1980, Act No. 2 of July 30, 1974, as amended [Exhibit 1], regarding the process of public policy, see *First National Bank v. Bellotti*, 435 US 765; see also Concurrent Opinion of Judge Frankfurter in the case of *Kovacs v. Cooper*, 336 US 77).

4. The application of Section 8 of Law 221 of May 15, 1948, as amended, does not violate the equal protection of the law, according to Amendment XIV of the Constitution of the United States, applicable to Puerto Rico, since said section applies to *all gaming rooms in Puerto Rico*. The Section does not grant any distinction over the different operators of the gaming rooms, therefore, there is no unequal treatment towards the operators. The meaning of equal protection of the laws implies equality among all in similar circumstances, with regard to privileges as well as responsibilities (*Hauser v. North British & Mercantile Ins. Co.*, 206 NY 455). There is a guarantee under equal protection of

*Answer to the Complaint and Its Exhibit 1, Dated June 22, 1982 (Translation)*

the law that there will be no discrimination against some and in favor of others. This guarantee does not intend to take away from the states the right and power of classifying the objectives or public policy of the legislature (*Jeffrey Mfg. Co. v. Blagg*, 235 US 571). Any adjustment or classification which the government may make in resolving its problems does not per se violate the clause of equal protection unless the legislation is a hostile one. The government is granted broad discretion to develop its laws and regulations (*Norvell v. Illinois*, 373 US 420).

5. The regulation to which plaintiff alleges in the sense that it exceeds the legislative provision has no basis whatsoever nor violates the equal protection of the law, since the jurisprudential doctrine states that this protection is violated if the regulation is irrelevant to the objective which the law pursues (*Holt Civic Club v. Tuscaloosa*, 58 L. Ed. 2d. 292).

The law states that no gaming room will be allowed to advertise or offer itself to the public in Puerto Rico *in any manner whatsoever*. This provision is sufficiently flexible so as to regulate the manner and the circumstances in which advertising is not allowed. The dynamic sense of the regulatory provisions in effect are consonant with the law, since it allows a broad interpretation pursuant to the exposition of motives previously mentioned.

6. Defendant has interpreted the legal provision in a practical and objective manner prohibiting any type and manner of advertising in Puerto Rico and liberally allowing advertising in the exterior (Exhibit 2). This is precisely what the legislator wanted.

WHEREFORE, we respectfully request from this Honorable Court that it dismiss the present petition for Declaratory Judgment with any other provision that may be legally applicable.

In San Juan, Puerto, June 22, 1982.

(sgd. Julio M. Santiago)  
ANA MARIA COLON COLON  
JULIO M. SANTIAGO  
Attorneys for Defendant  
Puerto Rico Tourism Company  
Box 4435-Old San Juan Sta.  
San Juan, Puerto Rico 00905

[Certificate of service omitted in printing]

[R44]

*Exhibit 1.*

(TRANSLATION)

[No. 13]

[Approved June 16, 1980]

LAW

To amend Section 5 of Act No. 221 of May 15, 1948, as amended and Article 11 of Act Number 2, of June 30, 1974, known as the Games of Chance Act in order to extend its term, create the "Development Fund for the Tourism Industry of Puerto Rico" and provide for the gradual reduction of slot machines in Puerto Rico.

*Answer to the Complaint and Its Exhibit 1, Dated June 22,  
1982 (Translation)*

EXPOSITION OF MOTIVES

Act Number 2 of July 30, 1974, which amended Act 221 of May 15, 1948, as amended, legalized the introduction, possession, use and operation of slot machines. Said law provided a term of three years as of the date of its approval. At a later date and before said term expired, the Legislature of Puerto Rico approved Law Number 5 of June 15, 1976, extending the effectiveness of Law 2, *supra*, for a term of six (6) years as of July 30, 1974. The aforementioned law, in its exposition of motives established that the same had the purpose of providing a temporary economic relief, while a long term plan was formulated by the Puerto Rico Tourism Company to revitalize and stabilize the tourism industry. The law further emphasized that the governmental officials involved indicated that said plan would be formulated within a term of three years, and that as a question of public policy it was stated that "the basis of Puerto Rico's tourism attraction is and shall continue to be its extraordinary natural beauty, especially its beaches, its historical sites and the charm of its people."

*It is the policy of the Government of Puerto Rico to discourage games of chance and to promote the attitude of the individuals to obtain income on-the basis of their effort and work.*

Since Act number 2, *supra*, was approved there have been some hotels, which despite the benefit of having slot machines closed operations and others which have not needed them for their subsistence. In addition, a concerted action is required between the Puerto Rico Tourism Company, the Puerto Rico Industrial Development Company, and the Government Development Bank of Puerto Rico in

*Answer to the Complaint and Its Exhibit 1, Dated June 22,  
1982 (Translation)*

order to establish the guidelines and norms which best serve the development of the tourism industry and to help and strengthen the hotel industry.

Some hotels have not paid their duties to the Government of Puerto Rico, owe large amounts of monies for taxes and other payments required by law, which amounts of monies in some cases have been guaranteed by the earnings from the operation of the slot machines.

It is necessary to eventually eliminate the slot machines as alternate economic means are established to provide for the strengthening and growth of the hotel industry. The maintenance of this industry is beneficial for the work force and provides substantial income to the economy.

It is therefore proper to legislatively provide an extension for the legal use of the slot machines during which time the number of said machines in operation shall be gradually reduced, until their desired total elimination.

[Text of law omitted in printing]

**[R59] Motion Requesting Leave to Intervene, Dated  
November 15, 1982 (Translation).**

[Filed Nov. 15, 1982, caption omitted in printing]

**TO THE HONORABLE COURT:**

Comes now the Secretary of Justice, represented by its undersigned attorneys and respectfully, States, Alleges and Pleads:

1. In the present complaint it is requested of this Honorable Court that it declare unconstitutional Section 8 of Act 221 of May 25, 1948, as amended, known as the "Games of Chance Act," and the pertinent provisions of its Regulations.

2. Despite the fact that the hearing in its merits of the present case is set for November 24, 1982, this request will not delay the proceedings, since the party herein is prepared to sustain the constitutionality of the aforementioned law on the previously mentioned date.

3. In matters of constitutional law construction the governing principle is that a statute *is and is presumed to be constitutional* until a competent Court declares the contrary, *Esso Standard Oil v. APPR*, 95 D.P.R. 772, 783 (1968).

WHEREFORE it is requested that this Honorable Court grant the intervention of the Secretary of Justice of Puerto Rico, as requested.

**RESPECTFULLY SUBMITTED.**

[Certificate of service omitted in printing]

\* \* \*

**[R62] Motion Requesting Summons of Custodian of  
Lottery Ads, Dated November 12, 1982, Filed on  
November 15, 1982 (Translation).**

[Filed Nov. 15, 1982, caption omitted in printing]

**TO THE HONORABLE COURT:**

Comes now petitioner in the above captioned case through its undersigned attorney and respectfully REQUESTS and PRAYS:

1. That a hearing on the merits in the above captioned case has been scheduled for November 24, 1982.

2. That as part of its evidence petitioner wishes to present the advertisement which the Puerto Rico Lottery uses in its television campaign for the One Million Dollar Drawing.

3. That the advertising agency in charge of said advertisement and/or the custodian of same is Joe Franco & Associates, whose address is 1120 Ashford Avenue, Condado, San Juan, Puerto Rico, who will only appear in Court through a summons to said effect.

WHEREFORE, we respectfully request that this Honorable Court issue a summons addressed to Joe Franco & Associates and/or the custodian of the advertisement of the Lottery of Puerto Rico corresponding to the million dollar drawing, so that he appear at the hearing scheduled for November 24, 1982, bringing with him copy of the advertisement which specifically says:

"Gamble, gamble, gamble, since only gambling can you win."

[Certificate of service omitted in printing]

**[R64] Order Summoning Joe Franco & Associates,  
Dated November 22, 1982 (Translation).**

[Caption omitted in printing]

Having seen the motion of November 12, 1982, it is ordered that a summons be issued to Joe Franco & Associates and/or the custodian of the advertisement of the Puerto Rico Lottery corresponding to the one million dollar drawing to appear at the Superior Court of San Juan, Room 908, on November 24, 1982, at 9:00 a.m. bringing with him copy of the advertisement which specifically says:

“Gamble, gamble, gamble, since only gambling can you win.”

ISSUED in San Juan, Puerto Rico, November 22, 1982.

RECORD AND NOTIFY.

(signed)

GUILLERMO ARBONA LAGO

Superior Court Judge

[Notification omitted in printing]

\* \* \*

**DOCUMENTARY EVIDENCE ON RECORD BY  
PLAINTIFF.**

**[RP1] Letter Dated June 21, 1978 (Translation).**

[Letterhead of Tourism Company omitted in printing]

June 21, 1978

Mr. Ruben C. Causa  
Casino Director  
Condado Holiday Inn Hotel  
San Juan, Puerto Rico

Dear Mister Causa:

We acknowledge receipt of your letter of June 19, 1978 received this afternoon in this Office requesting authorization to take photos inside the casino for the new brochure.

You are authorized to take said photos in the casino before 12:00 noon and we remind you that the necessary measures be taken to prevent taking photos of the name of the casino, tourists playing in the gaming tables as well in the slot machines.

Cordially,

(signature)  
VICTOR M. MOLINA  
Director  
Gaming Department

**[RP2] Letter, Dated June 1, 1978.**

[Letterhead of Tourism Company omitted in printing]

June 1, 1978

Mr. Hugh Andrews  
General Manager  
Condado Holiday Inn  
San Juan, Puerto Rico

Dear Sir:

In previous letters I have pointed out to Mr. Ruben Causa, that advertising the casinos in Puerto Rico is prohibited by law. Ads appearing in the newspapers are not suppose *[sic]* to mention or illustrate casino operations when the hotel or anything related to it is advertised.

There was an ad published in one of the local newspapers last month and I want to quote once more the amendment made to Paragraph (7) of Section I of the Gambling Act, made on September 6, 1957. The same reads as follows:

Section I—Concessionaires

(7) "No concessionaire, nor his agent or agent *[sic]* or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. It is hereby authorized the advertising of our games of chance through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company.

*RP2—Letter, Dated June 1, 1978*

Without the previous authorization by the Company, no one shall be allowed to photograph, of film movies within the gambling parlors".

If this violation is repeated in the future we will enforce the Gambling Act and apply the penalties prescribed by it.

Sincerely,

VICTOR M. MOLINA  
Gambling Director

VMM/GI/hem

[RP3] Ad in the San Juan Star Supplement  
(Translation).

[Drawing of a Roulette Table]

THE CASINO  
EMPLOYEES  
ASSOCIATION  
OF THE CONDADO  
HOLIDAY INN

Warmly congratulates the management, officers and employees of said Hotel in the inauguration of its new and magnificent facilities.

We thank and urge these excellent professionals to continue their successful work in the hotel and tourism industry in Puerto Rico.

Sr. Jose Reyes de Jesus, Pres.  
Mr. Joaquin Marcial Rojas, Treas.  
Mr. Pedro A. Figueroa, Sec.

[RP4] Letter Dated July 10, 1978 from Victor Molina to Hugh Andrews, With Two Enclosures (One Translated).

[Tourism Company letterhead omitted in printing]

\*

Dear Mr. Andrews:

We have not received a reply to our letter of June 1, 1978 pointing out to you that a violation of the Section 1, Paragraph (7) referring to advertising the casinos in Puerto Rico had been committed by your hotel.

We have reconsidered our position in relation to this matter and due to the fact that you have not paid any attention to our warning, we the Tourism Company, by the power bestowed in us by the Gambling Act of Puerto Rico are punishing the Condado Holiday Inn Hotel with a fine of five hundred dollars (\$500.00) payable in money order or certified check to the Secretary of the Treasury of Puerto Rico, Bureau of Banks and Financial Institutions.

This fine must be paid within ten (10) days after receiving this notice.

If this violation is repeated in the future; we will be forced to suspend or revoke the rights and privileges enjoyed in the operation of a casino by your hotel, for an indefinite period of time.

In regard with your letterhead the word "Casino" must be omitted from it, as it had been informed to you in previous letter (see attached copy of your letterhead). We are also including, once again, a copy of Section 1, Paragraph (7) of the Games of Chance Regulations of Puerto Rico.

\*

[Copies omitted in printing]

[RP4] *Exhibit 1 to Letter Dated July 10, 1978 from Victor Molina to Hugh Andrews [Regulatory and Legal Provisions].*

TO AMEND PARAGRAPH (7) OF SECTION 1, AND SECTIONS 35, 41 AND 55 OF THE GAMES OF CHANCE REGULATIONS, APPROVED BY THE ADVISORY BOARD OF TOURISM ON AUGUST 22, 1949, FILED BEFORE THE SECRETARY OF STATE ON SEPTEMBER 6, 1957.

Pursuant to the authority vested on me by Sections 4, 5, 7 and 9 of Act. No. 221 of May 15, 1948, known as the Games of Chance Act of Puerto Rico, as amended, I hereby approve the following amendments to paragraph (7) of Section 1 and Sections 35, 41 and 55 of the Games of Chance Regulations approved on August 22, 1949.

#### SECTION 1. CONCESSIONAIRES

(7) *No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico.* It is hereby authorized the advertising of our games of chance through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company. Without the previous authorization by the Company, no one shall be allowed to photograph, of film movies within the gambling parlors.

[The rest of the text omitted in printing]

Approved on May 22, 1971, La Fortaleza, San Juan, Puerto Rico

\* \* \*

[RP4] *Letter Dated July 10, 1978 from Victor Molina to Hugh Andrews, With Three Enclosures (One Translated)*

#### AN ACT

To amend the title and sections 4 and 9, and re-enact sections 1, 3, 5, 6 and 10 of, and add section 7 (a) to, Act No. 221, approved May 15, 1948, known as the Games of Chance Act, as subsequently amended by Acts Nos. 21 and 24, approved June 7, 1948, Act No. 343, approved May 14, 1949, Act No. 373, approved May 8, 1951, and Act No. 25, approved April 5, 1952.

Be it enacted by the Legislature of Puerto Rico:

[Text omitted in printing except Sections 8 & 9]

Section 8.—No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico; or to admit persons under eighteen years of age.

“Section 9.—The Secretary of the Treasury may cancel the license granted under this act to any person who (a) fails to meet the requirements demanded by section 3 of this act (b) fails to pay when due, or evades payment of, the license fees; (c) violates any of the provisions of this act or of the regulations prescribed for the enforcement hereof. The Department of the Treasury may impose administrative fines on a licensee in any of the cases referred to in this section, in a sum not less than one hundred (100) dollars nor more than ten thousand (10,000) dollars for each violation. The amount of the fine shall be covered into the general funds of the Secretary of the Treasury of

*[RP4] Letter Dated July 10, 1978 from Victor Molina to Hugh Andrews, With Three Enclosures (One Translated)*

Puerto Rico and unless it is paid within thirty (30) days after notice thereof is served on the licensee, the Secretary of the Treasury may cancel the license or proceed to the collection of the fine following the same procedure used for the collection of license fees.

"Any person who introduces in a gambling casino or club-house or who uses or attempts to use therein a gambling device different in nature and specifications from those prescribed by law or by the regulations approved under the laws authorized and regulating the games of chance, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for a minimum term of five (5) years or a maximum term of ten (10) years.

"After the regulations prepared by the Administration to govern everything concerning the games of chance are approved by the Governor and published by the Administration, the same shall have the force of law, and any violation thereof shall be a misdemeanor. Every person violating any of the provisions of this act of the regulations of the Administration, except as otherwise provided herein, shall upon conviction be punished by a fine not less than fifty (50) dollars nor more than one thousand (1,000) dollars, or by imprisonment for a term not less than one (1) month nor more than one (1) year, or by both penalties, in the discretion of the court.

*"Irrespective of the penalties prescribed in this act, the Administration and the Secretary of the Treasury are hereby empowered to punish administratively all violations to the orders and regulations by a fine not to exceed*

*[RP4] Letter Dated July 10, 1978 from Victor Molina to Hugh Andrews, With Three Enclosures (One Translated)*

*five hundred (500) dollars or by temporary suspension or revocation of the rights and privileges enjoyed in the operation of the games of chance by the natural or artificial person guilty of the violation.*

The Secretary of the Treasury or the Administration may temporarily or permanently suspend or cancel the franchise, license, rights and privileges enjoyed under the Games of Chance Act by any natural or artificial person, and their decisions to that effect shall be final and unappealable."

[Remaining text omitted in printing]

[RP4] *Exhibit 2 to Letter Dated July 10, 1978 from Victor Molina to Hugh Andrews.*

[Letterhead omitted in printing, except]  
Casino of San Juan, P.R.

(Translation)

July 10, 1978

Mr. Victor Molina  
Gaming Director of  
Puerto Rico

Dear Mister Molina:

We hereby wish to request your permission, and the cooperation that you have always offered to us, for the following: the corporation has resolved to place the Casino in the best possible condition, and it will be completely redecorated by changing the rugs, roof, walls, lights, in short, everything necessary to have something nice to present to our clients.

Therefore, it is estimated that we will need a period of eight (8) weeks in order to do the job in a partial manner, whereby I request your permission to move some tables, so as to keep the Casino open.

With anticipated thanks for your attention.

Cordial greetings,

CONDADO HOLIDAY INN

(signature)  
Ruben C. Causa  
Casino Director

\* \* \*

[Address omitted in printing.]

[RP5] **Letter Dated July 13, 1978, from Hugh Andrews to Doel Garcia.**

[Condado Holiday Inn letterhead omitted in printing]

July 13, 1978

Mr. Doel Garcia  
Tourism Director  
Tourism Development Co.  
G.P.O. Box BN  
San Juan, Puerto Rico 00936

Dear Doel:

Enclosed herewith please find copy of the letter I received yesterday from Victor Molina, Director of the Gambling Division of the Tourism Company. I would appreciate very much your reviewing the accusations of Mr. Molina and your learned opinion as to whether you feel that the Condado Holiday Inn is in violation of the Ley de Juegos de Azar de Puerto Rico.

My understanding, and it is very clearly stated in paragraph 7 Section I of the above referred law, that in no way, shape or form has the Condado Holiday Inn advertised to the populace of Puerto Rico its casino operation. The two "violations" mentioned by Mr. Molina which are taken from the special San Juan Star supplement dated May 26th, 1978 have nothing to do with actions on our part.

In one case, it was an advertisement taken out by the Casino Employees Association directly with the San Juan Star without our knowledge or approval as obviously the picture of the roulette table could be interpreted by some people as being an advertisement for the casino, which was

*[RP5] Letter Dated July 13, 1978, from Hugh Andrews  
to Doel Garcia*

not the intention if one takes a moment to read the text. If Mr. Molina decides to prosecute a violation of the gaming law because of this ad, may I suggest he address his complaint to the three individuals whose signatures appear at the bottom of the ad and not the management of the Condado Holiday Inn.

The second advertisement that Mr. Molina takes offense to is an editorial by San Juan Star business editor Harry Fridman on the fine human resources team of the Condado Holiday Inn and among many others, includes a picture with the name and title of our casino manager. Under no stretch of the imagination could anyone find that this is advertising under the gambling laws of Puerto Rico.

The third issue that Mr. Molina has found offensive is the fact that Condado Holiday Inn Hotel and Casino business stationery, which is used for correspondence outside of Puerto Rico, was inadvertently used in a letter written by Mr. Ruben Causa to Mr. Molina. I cannot imagine the mentality that considered the printed word casino in private stationery a violation of casino advertising.

It is the intention of the Condado Holiday Inn in every aspect of its operation to be good citizens as well as abide to its fullest by every law and regulation governing its activities.

*[RP5] Letter Dated July 13, 1978, from Hugh Andrews  
to Doel Garcia*

I look forward to discussing these charges with both yourself and Mr. Molina at your earliest convenience.

Yours very truly,

CONDADO HOLIDAY INN

Hugh A. Andrews,  
General Manager

\* \* \*

**[RP6] Letter of August 1, 1978, from Victor Molina to Tom Monroe, With Enclosures.**

[Tourism Company letterhead omitted in printing]

\* \*

Dear Mr. Monroe

The Tourism Company of Puerto Rico through its Department of Gambling has demanded that the Condado Holiday Inn Hotel pay a fine of five hundred dollars (\$500.00), due to certain violations committed by your local management after our having sent them several warnings in relation to advertising the casino in the Island Telephone Directory, local newspapers, and other publicity media. The warnings were obviously ignored and what we had pointed out as a clear violation of the law was repeated again and again.

It is stated clearly by the Gambling Act of Puerto Rico that the concessionaire obligates himself to accept the conditions and rules which the Tourism Company may formulate covering the operation of the Gambling Parlors. Advertising the casinos in Puerto Rico is prohibited and neither his concessionaire, nor his agent or employee is authorized to advertise the gambling parlors.

"Section 1. Concessionaires"

[Text of paragraph 7, Section 1, omitted in printing as it has been quoted before.]

The Franchise Regulations for the Gambling Parlors in Puerto Rico, among other requirements, also requires experienced and competent persons to manage the hotels where gambling casinos are located.

*[RP6] Letter of August 1, 1978, from Victor Molina to Tom Monroe, With Enclosures*

We know very well that Mr. Ruben C. Causa, as Casino Manager, has the necessary knowledge, experience, and competence. But, we think that Mr. Hugh Andrews should learn a little about our gambling laws, and be more respectful in matters that are related to this Department. (See letter received from Mr. Andrews dated July 13, 1978 attached).

The five hundred dollar (\$500.00) fine is still outstanding and the Treasury Department will not renew the casino license unless it is fully paid. If this violation is repeated in the future, we will be forced to apply the maximum penalty prescribed by law, which is the cancellation of the casino license for an indefinite period of time.

Gambling has been legal in Puerto Rico since 1948 and we have been enforcing the law since then, not only for the benefit of the Government of Puerto Rico but also for the good name and improvement of our Tourism Industry.

Attached you will find copies of some of the ads questioned by this office, such as stationery-envelopes, invoices, etc. (Our Accounting Department received many of these invoices.)

Your cooperation regarding this regretful matter will be of great value to us.

34a

[RP6] *Exhibit 1 to Letter of August 1, 1978, from Victor Molina to Tom Monroe—Invoice*

[Condado Holiday Inn letterhead omitted in printing except]

Casino of San Juan, Puerto Rico

•

### INVOICE

Le Lo Lai charge #0-48254

Att: Elaine Gonzales

Enclosed please find our statement which covers charges for your recent visit to Condado Holiday Inn, in a total amount of \$7.10.

Please detach and return the top half of this invoice with your remittance. Retain lower half for your records. If there are any questions about the items herewith, please note them on the reverse side and return with your payment. Be sure the Condado Holiday Inn address shows through the window of the enclosed envelope.

Thank you.

•

[Ticket omitted in printing]

35a

[RP6] *Exhibit 2 to Letter of August 1, 1978, from Victor Molina to Tom Monroe, Invoice*

[Letterhead of Condado Holiday Inn omitted in printing, except]

Casino of San Juan, Puerto Rico

•

### INVOICE

HB#17196-E. Mays

Pres. Miss Wheelchair National Contest invited by  
Tourism  
Company for Miss Wheelchair activity

Enclosed please find our statement which covers charges for your recent visit to the Condado Holiday Inn, in a total amount of \$118.10.

Please detach and return the top half of this invoice with your remittance. Retain the lower half for your records. If there are any questions about the items herewith please note them on the reverse side and return with your payment. Be sure the Condado Holiday Inn address shows through the window of the enclosed envelope.

Thank You.

•

**[RP7] Letter of August 14, 1978, from Hugh A. Andrews to Doel Garcia.**

August 14, 1978

Mr. Doel R. Garcia  
Tourism Director  
Tourism Development Co.  
G.P.O. Box BN  
San Juan, Puerto Rico 00936

Dear Doel:

It was a pleasure talking with you today in regard to our misunderstanding with Mr. Victor Molina of the Gambling Department.

As per your instructions we will not pay the \$500.00 fine as indicated in the letter of August 1st from the Director of the Gambling Division as you have settled this matter with Mr. Molina and the Board of Directors of the Tourism Company.

I look forward to meeting with you and Mr. Molina upon your return from Santo Domingo so that we can achieve the good working relationship that we both desire.

Yours very truly,

CONDADO HOLIDAY INN  
Hugh A. Andrews,  
General Manager

•

**[RP8] Letter of September 1, 1978, from Victor M. Molina to Hugh Andrews, With Enclosures.**

[Letterhead of Tourism Company omitted in printing]

September 1, 1978

(Date of Receipt: Sept. 13, 1978)

Mr. Hugh A. Andrews  
General Manager  
Condado Holiday Inn  
999 Ashford Avenue  
San Juan, Puerto Rico 00906

Dear Mr. Andrews:

On this morning, September 1st, we answered Mr. T. E. Monroe a letter dated August 24, 1978. A copy of this letter is included and you will find that another \$500.00 fine have been added to the previous one.

The hotel letterhead still reads Condado Holiday Inn and Casino. This was suppose [sic] to be changed to Condado Holiday Inn and the word *casino* omitted from it.

As we say in Mr. Monroe letter it does not matter for what purpose it is used. There are no hotels here in Puerto Rico authorized to use the word casino in their letterheads. In both cases we have enforced the law and fines have been imposed.

The fines have to be paid on the date of the franchise renewal (September 16, 1978) or the same will not be granted.

Sincerely,  
VICTOR M. MOLINA  
Director  
Gambling Department

[RP8] *Exhibit 1 to Letter of September 1, 1978, from  
Victor M. Molina to Hugh Andrews*

[Tourism Company Letterhead omitted in printing]

September 1, 1978

Mr. T. E. Monroe  
President  
Condado Holiday Inn  
Posadas de America Central  
Chromolloy Plaza  
120 S. Central Avenue  
St. Louis, Missouri 63105

Dear Mr. Monroe:

I refer to your letter dated August 24, 1978.

The matter regarding the Gambling Act advertising prohibitions and violations committed by the Condado Holiday Inn are still unsettled.

Another fine of \$500.00 is hereby imposed to the Condado Holiday Inn for the repetition of the previous violation.

The local invoices received by our Department of Finances and all the stationery used by the hotel still reads, Condado Holiday Inn and Casino of Puerto Rico. No matter for what purposes it is being used; the word *Casino* must be omitted from it.

These fines have to be paid on the date when the Franchise Fees for the next three (3) months are renewed (September 16, 1978). The Treasury Department will not renew this franchise if this debt is not paid.

I sincerely regret that this matter have [sic] been carried this far but as long as the law is violated we will be force [sic] to apply the penalties that we consider just.

\* \* \*

[RP8] *Exhibit 2 to Letter of September 1, 1978, from  
Victor M. Molina to Hugh Andrews, With Enclosures*

[Condado Holiday Inn letterhead omitted in printing  
except]

And Casino of San Juan, Puerto Rico

August 24, 1978

Sr. Victor M. Molina  
Commonwealth of Puerto Rico  
Tourism Company  
Banco de Ponce Building  
268 Munoz Rivera Avenue  
Hato Rey, Puerto Rico 00918

Dear Sr. Molina:

Thank you for your letter of August 1 concerning certain provisions in the Gambling Act of Puerto Rico as they relate to the Condado Holiday Inn. This matter was discussed at our recent operating meeting, and I understand that the situation has been resolved between your office and the hotel.

Allow me to extend my apologies for any inconvenience or misunderstanding that this matter may have caused. I have received assurances from the hotel management that any reference to the casino in hotel stationery, etc., is in no way intended to be a form of advertising but is merely a means of identifying the company.

[RP8] *Exhibit 1 to Letter of September 1, 1978, from Victor M. Molina to Hugh Andrews*

I trust that this matter has been resolved to your satisfaction and would appreciate your contacting me if I can be of any further assistance.

Very truly yours,

T.E. MONROE  
President

[Condado Holiday Inn envelope with its trade name bearing the word casino, omitted in printing]

[RP9] **Letter, Dated September 13, 1978, from Hugh Andrews to Victor Molina.**

[Condado Holiday Inn letterhead omitted in printing]

Dear Mr. Molina:

It was indeed a pleasure having the opportunity to meet with you this morning and discuss along with Mr. Doel Garcia and Pedro De Aldrey your concerns about the Condado Holiday Inn's possible violation of the spirit and intent of Puerto Rico's gaming regulations.

It was very encouraging for me to see the professionalism and seriousness with which the Gambling Department takes over the strict control of casinos in Puerto Rico, and I would like to reiterate that we at the Condado Holiday Inn desire to support you in any way that we can.

As we discussed, it was decided to leave to one side for the time being a determination as to whether the Condado Holiday Inn is in violation of the gambling law by using the word "casino" in its personal stationery until the Board of Directors of the Tourism Company issues a clear and precise definition as to what constitutes advertising.

Please be assured that it is our intention to comply with any and all laws and regulations that pertain to our operations as a hotel and that if we have inadvertently failed to follow any of these laws and regulations due to a lack of understanding or interpretation, we agree to submit ourselves to whatever penalties the Board of Directors of the Tourism Company deems appropriate.

Once again I thank you for the opportunity of meeting with you today and trust that our relationship in the future will continue to be a smooth and pleasant one.

\* \*

**[RP10] Letter, Dated September 14, 1978, from Victor Molina to Mr. Julian O'Farrill (Translation).**

[Tourism Company letterhead omitted in printing]

(Translation)

September 14, 1978

Mr. Julian O'Farrill O'Farrill  
Acting Director  
Bureau of Banks and Financial  
Institutions  
Department of the Treasury  
San Juan, Puerto Rico

Dear Mister O'Farrill:

We confirm our telephone conversation of yesterday afternoon regarding the fine imposed on the Condado Holiday Inn Hotel for violating the casino publicity section of the Gaming Law and Regulations.

Mr. Hugh Andrews, General Manager of said hotel, has met with our Executive Director, Mr. Doel R. Garcia, with Mr. Pedro de Aldrey, Sub-Director and with the undersigned yesterday morning. Mr. Andrews made some allegations, and he also excused the use of the word "casino" in the stationary and the printed material of the hotel. He also informed us that he was not in Puerto Rico during the last few weeks, therefore he could not take action regarding our warning letters.

I include copy of Mr. Andrews letter, where he informs us of his determination.

*[RP10] Letter, Dated September 14, 1978, from Victor Molina to Mr. Julian O'Farrill (Translation)*

I would appreciate your extending the franchise for the trimester which will begin next September 17, 1978. As soon as the case is settled, we will definitely contact you to inform you of our final determination.

I salute you,

Cordially,

(Signed)  
VICTOR M. MOLINA  
Director  
Gaming Department

**Enclosure**

cc: Mr. Hugh Andrews  
Mr. Ruben C. Causa  
Leo Smith, Esq.  
Mr. Cesar R. Molina  
Mr. Doel R. Garcia  
Mr. Pedro de Aldrey  
Mr. Carlos A. Diago

**[RP11] Letter of February 20, 1979 to Mr. Hugh Andrews from Victor M. Molina, Julian O'Farrill and Leo Smith Perez with Ads in Which the Word Casino is Used and Copy of Correspondence and Franchise Request (Three Translations).**

[Tourism Company letterhead omitted in printing]

February 20, 1979

Mr. Hugh Andrews  
General Manager  
Condado Holiday Inn Hotel  
San Juan, Puerto Rico

Dear Mr. Andrews:

Once again we are reminding you about the contents of the text of Section 76 a 1 (7) of the Rules and Regulations of the Games of Chance of Puerto Rico which, seems to us, you have forgotten and reads like this:

"Section 76a-1. Concessionaires"

(7) [Text of regulation omitted in printing as it has been quoted before]

On July 10, 1978 you were given notice of a Five Hundred Dollar (\$500.00) fine for violating said Rules and Regulations of the Games of Chance of Puerto Rico. Previously on June 1, 1978, you were informed of the violations incurred and again on July 12, 1978 our investigator, Mr. Jorge L. Torres Ledesma, personally delivered to you all the documents pertaining to said violations.

On September 1, 1978, communication took place when another notice was given to you, of another violation of

*[RP11] Letter of February 20, 1979 to Mr. Hugh Andrews from Victor M. Molina, Julian O'Farrill and Leo Smith Perez with Ads in Which the Word Casino is Used and Copy of Correspondence and Franchise Request (Three Translations).*

said Rules and Regulations and you were fined, again, for another Five Hundred Dollars (\$500.00) in addition to the previous fine of July 10, 1978.

We would like, at this point, to refer you to the Application for a Franchise for the Exploitation of Gambling Parlors made by your Hotel, in which the franchiseholder commits itself not to advertise or offer to the public in Puerto Rico, *in any manner*, the gambling parlors, neither permit, in said parlor, persons under eighteen (18) years of age. This, was duly sworn to before a Notary Public by the franchiseholder.

Today we are imposing an additional fine of Five Hundred Dollars (\$500.00) for violating, again, said Rules and Regulations of the Games of Chance and for violating your commitment to us in your application for the franchise to exploit a gambling parlor. This new violations were the results of a new brochure published by you, in English in the lobby of your Hotel. This brochure was handed to one of our inspectors by one of your guests. Later on the inspector got a few samples at the front desk of your Hotel.

This new fine has been added to the other two fines that were pending under the condition that you would not persist on the illicit procedures of advertising which you insist on doing, thus violating the Rules and Regulations of the Games of Chance, which happen to be very specific in its contents.

Due to all the above mentioned we are enforcing the mentioned Rules and Regulations with all its vigour.

*[RP11] Letter of February 20, 1979 to Mr. Hugh Andrews from Victor M. Molina, Julian O'Farrill and Leo Smith Perez with Ads in Which the Word Casino is Used and Copy of Correspondence and Franchise Request (Three Translations).*

Therefore, you must pay the amount of One Thousand Five Hundred Dollars (\$1,500.00), to the Treasury Department within ten (10) days of having received this notification.

The total amount must be paid "in full". Not complying with this obligation will result in a revocation of the franchise to exploit the gambling parlor, on the next renewal date due on March 18, 1979.

Enclosed you will find copy of all correspondence sent, evidence of the violations, and copy of an Application for Franchise to Exploit a Gambling Parlor in Puerto Rico.

\*\*\*

*[RP11] Exhibit I to Letter of February 20, 1979 to Mr. Hugh Andrews*

(Translation)

(Envelope)

CONDADO HOLIDAY INN  
Casino of San Juan, P.R.  
P.O. Box 5719, Puerta de Tierra  
San Juan, Puerto Rico 00906

Mr. Victor M. Molina, Gaming Director  
of Puerto Rico  
Tourism Development Company  
San Juan, Puerto Rico

(Seal of receipt by Gaming Dept.  
of Tourism Development Company  
dated Aug 17 1978, 8 o'clock)

(Condado Holiday  
Inn Logo)

[RP11] *Exhibit 2 to Letter of February 20, 1979 to Mr. Hugh Andrews (Translation)*

[Condado Holiay Inn letterhead omitted in printing, except]  
Casino of San Juan, P.R.

(Translation)  
August 7, 1978

Mr. Victor M. Molina, Gaming Director  
of Puerto Rico  
Tourism Development Company  
San Juan, Puerto Rico

Dear Mister Molina:

We hereby request that you please authorize the casino of the Condado Holiday Inn Hotel to open from 1 p.m. to 4 a.m. during the following days:

Monday, August 7, 1978  
Tuesday, August 8, 1978  
Wednesday, August 9, 1978  
Thursday, August 10, 1978  
Friday, August 11, 1978  
Saturday, August 12, 1978  
Sunday, August 13, 1978

Thankful for your attention.

Cordial greeting,

(signature)	(Seal of receipt by Gaming Dept.
Ruben C. Causa	of Tourism Development Company
Casino Director	dated Aug 17 1978, 8 o'clock)

[RP11] *Exhibit 3 to Letter of February 20, 1979 to Mr. Hugh Andrews (Translation)*

[Condado Holiday Inn letterhead omitted in printing, except]  
Casino of San Juan, P.R.

(Translation)  
August 14, 1978

Mr. Victor M. Molina, Gaming Director  
of Puerto Rico  
Tourism Development Company  
San Juan, Puerto Rico

Dear Mister Molina:

We hereby request that you please authorize the casino of the Condado Holiday Inn Hotel to open from 1 p.m. to 4 a.m. during the following days:

Monday, August 21, 1978  
Tuesday, August 22, 1978  
Wednesday, August 23, 1978  
Thursday, August 24, 1978  
Friday, August 25, 1978  
Saturday, August 26, 1978  
Sunday, August 27, 1978

Thankful for your attention.  
Cordial greeting,

(signature)	(Seal of receipt by Gaming Dept.
RUBEN C. CAUSA	of Tourism Development Company
Casino Director	dated Aug 17 1978, 8 o'clock)

RCC/et

[Model of six similar letters of same date omitted in printing]

*[RP11] Ads Enclosed to Letter of February 20, 1979 to  
Mr. Hugh Andrews from Victor M. Molina, Julian  
O'Farrill and Leo Smith Perez.*

Stay at the hotel  
you won't want to leave.

(5 photos)



# The Condado Holiday Inn Resort & Casino San Juan, Puerto Rico

Splendidly situated overlooking the azure Caribbean, The Condado Holiday Inn Resort & Casino offers remarkable vistas and a multitude of activities to fill your every day and night.

You'll find everything from water sports and lighted tennis courts to fine restaurants, lively entertainment and a dazzling casino.

No wonder we say it's the hotel you won't want to leave.

And yet... what a shame if you didn't. Because there are so many exciting things to see and do just outside or mere minutes away.

Wander about the fashionable Condado district, with its many charming homes, smart shops and other points of interest.

Only ten minutes away are the fascinating restaurants, shops and history of Old San Juan.

Plus race tracks, museums, an abundance of art galleries, famed Fort El Morro, beautifully landscaped parks and gardens, rum distilleries (where you can sample the island's most famous product) and a glorious countryside to explore. And so much more, too:

Your hotel is in the tradition of the world's best resorts, spacious, beautifully furnished rooms and luxurious suites. And, of course, children under 18 stay free in your room.

With its many shops and facilities, Condado Holiday Inn is truly a self-contained paradise. Add to that our superb service, and you'll see why there's really no other place to stay in San Juan.

Come visit us soon. You won't ever want to leave.




the finest in  
national entertainment.

Try your luck at the most  
beautiful casino in Puerto Rico.


Dance the night away at Isadora, Wind up a day of unwinding  
San Juan's most exclusive club. with a leisurely stroll home.

60


(photo)




(photo)



(photo)



(photo)



*[RP11] Exhibit 5 to Letter of February 20, 1979 to Mr. Hugh Andrews from Victor M. Molina, Julian O'Farrill and Leo Smith Perez.*

[RP11] Exhibit 5 to Letter of February 20, 1979 to Mr. Hugh Andrews from Victor M. Molina, Julian O'Farrill and Leo Smith Perez.

## TRANSLATION

Commonwealth of Puerto Rico  
DEPARTMENT OF THE TREASURY  
Public Revenue Administration  
General Tax Bureau

APPLICATION FOR FRANCHISE OR RENEWAL OF  
FRANCHISE FOR THE OPERATION OF A GAMING  
ROOM

\_\_\_\_\_  
Date of Application

Name of Applicant \_\_\_\_\_

Application filed by \_\_\_\_\_

☐ Renewal ☐ Original License

The franchise that is being requested will be operated exclusively in the location hereinafter designated in this request, which is located at street \_\_\_\_\_ number \_\_\_\_\_

\_\_\_\_\_  
Building

\_\_\_\_\_  
Owner of Building

\_\_\_\_\_  
Name of Hotel, Restaurant, Casino,  
Entertainment Center, Club or  
Private Center where franchise  
will be operated)

[RP11] Exhibit 5 to Letter of February 20, 1979 to Mr. Hugh Andrews from Victor M. Molina, Julian O'Farrill and Leo Smith Perez.

## PETITIONER'S CERTIFICATION

I HEREBY CERTIFY that neither I, nor to the best of my understanding, the other people that are part of the society or corporation for which this franchise is being requested, have been convicted of a felony or misdemeanor which involves moral depravity, and all enjoy a good reputation in Puerto Rico.

To establish said gaming room, which we(I) shall own or administrate, I(we) possess the organization and means necessary, which shall be available for the tourist, as contemplated by Section 13 of Law 221 of May 15, 1948 and Section 3(c) of said Law, as amended.

The franchise which shall be granted to me(us) shall be placed and maintained in a conspicuous location in the gaming room.

I(we) bind myself(ourselves) to not advertise or offer the gaming room to the public in Puerto Rico in any manner whatsoever nor shall I(we) allow any person under 18 years of age in said room.

• • •

**[RP12] Memorandum Received March 12, 1979, at the Hotel With Enclosure of Ruling of Tourism Company as to What Constitutes Advertising (Translation).**

[Tourism Company letterhead omitted in printing]

(Translation)

# MEMORANDUM

**TO :** Holders of Franchises for the  
Operation of a Gaming Room  
General Managers of Hotels  
Casino Managers

**FROM :** Victor M. Molina  
Gaming Director

After a comprehensive and detailed study of Law No. 21 of May 15, 1948, as amended, and the administrative regulations and orders which govern our Gaming Department, the Legal Division has reached a final conclusion and has prepared the enclosed memorandum, related to the advertising of gaming rooms operated through a conditional franchise granted by the Secretary of the Treasury, pursuant to recommendation of this Tourism Company.

Therefore, all advertising, in any manner whatsoever, of the gaming rooms in Puerto Rico is forbidden, and all advertising outside of Puerto Rico must be approved by this Gaming Department.

Enclosure

[Ruling omitted in printing]

(There appears a notation of receipt of March 12, 1979)

**[RP13] Letter, Dated August 31, 1981, to Mr. Luis F. Ponce From Francisco Nolla Duran and Enclosure.**

[Tourism Company letterhead omitted in printing]

August 31, 1981

Sr. Luis F. Ponce  
The Centre  
4141 Blue Lake Circle  
Suite 200  
Dallas, Texas 75234

Dear Mr. Ponce:

Last Friday, July 31, Mr. Andrews sponsored a press conference and a photographic session at the facilities of the Condado Holiday Inn Casino in open violation to our present gaming rules and regulations. Specifically violating section 76 A-1, paragraph 7 of the Puerto Rico Gaming Rules and Regulations, as amended.

For the above mentioned violation we are imposing a five hundred (\$500) dollars fine to the Condado Holiday Inn Casino franchise holders. This fine is payable in Money Order or Certified Check to the Puerto Rico Treasury Department within thirty (30) days of this notice.

At the same time we are requesting your personal intervention on this matter due to the fact that this violation is a mere continuation of past violations of the Condado Holiday Inn management. In the past we have intervene *[sic]* in favor of the Condado Holiday Inn Management but this situation has gone out of hand.

\* \* \*

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*[RP13] Enclosure to Letter, Dated August 31, 1981, to  
Mr. Luis F. Ponce From Francisco Nolla Duran*

Hugh Andrews, manager of the Condado Holiday Inn, con-  
 ducts a mock service Friday for the hotel's slot machines | that are being phased out. The machines are draped with  
 black ribbons for the "West in Peace." (UPI photo)



# Holiday Inn raises 'little fuss' on slots removal

By MAGGIE BOBB  
 OF THE STAR BULLETIN

It was mourning time at the Condado Holiday Inn Casino Friday, when 33 slot machines draped in black ribbon had their plugs pulled by representatives of the Tourism Company.

Friday was the date that was set by legislation for removal of one third of the island's one-armed bandits, and Tourism Co. employees visited all casino hotels to disconnect the machines on schedule.

"We thought we should make a little fuss over their going," Condado Holiday Inn Manager Hugh Andrews, with tongue firmly in cheek. "After all, it is a momentous day in the history of tourism. If you don't cry, you have to laugh."

At present there are 1,142 machines on the island, including some in a Tourism Company warehouse, which also were counted in determining the one-third quota.

At the Condado Holiday Inn, 33 of the 122 machines were eliminated. Other casino hotels that also has the plugs pulled Friday are the San Juan, Palace, Caribe Hilton, La Concha, Isla Verde Holiday Inn, Gran Bahia, Cerromar, Dorado, Dupont Plaza and Carib Inn.

Andrews said he cannot understand how, in view of the crisis in government funds and the precarious financial situation of many hotels, the government could decide to continue eliminating a source of income like the slot machines.

During the past fiscal year, the hotels obtained \$3.94 million in income from the slot machines, on the basis of their 40 percent share. The rest of the income went to the government, with \$1.9 million each to the University of Puerto Rico, the scholarship fund for private university students, and the Tourism Company.

Although a bill was filed in the Legislature to postpone the implementation of the removal of the slot machines, time ran out in the special session before the measure could be passed.

The governor decided that one-third could be removed without doing major economic damage, so it was decided not to call another special session. However, the removal of the second third of the machines, originally scheduled for Dec. 31, will be postponed, through administrative measures.

It is expected that the next regular legislative session will approve a bill to retain the remaining slot machines, at least temporarily, until another source of government income can be found.

Although the plan to postpone the removal has been published in the press, Andrews said the hotels still have not heard anything official from Tourism Co. director Pedro de Aldrey on the subject.

"I guess the third they removed were the immoral ones, and maybe the other two thirds will be moral," Andrews said. He apparently was referring to the position of Sen. Nicolas Noguera, NPP-at large, who pushed through the original bill to phase out the slot machines in three stages. Gov. Romero is

THE SAN JUAN STAR-Saturday, August 1, 1981.

BEST AVAILABLE COPY

**[RP14] Memorandum, Dated May 8, 1981, from the  
Casino Director (Translation).**

[Tourism Company letterhead omitted in printing]

(Translation)

**MEMORANDUM**

**TO** : All Managers of Hotels  
and Casino Managers

**FROM** : Francisco Nolla Duran  
Gaming Director

**SUBJECT** : ADVERTISING OF CASINOS

Paragraph (7) of Section 1 of the Gaming Regulation states:

"No concessionaire, or agent or employee of same can advertise the gaming rooms to the public in Puerto Rico. Advertising in newspapers, magazines, radio, television or any other publicity media of our gaming rooms in the exterior is authorized, with the prior approval of the Tourism Company with respect to the wording of said advertisement, which shall be submitted in draft form to the Company. No photographs or films may be taken inside the casino at any moment without the prior authorization of the Company."

Everything established in this paragraph must be complied with, since a violation of same may result in a fine or the revocation of the license to operate the casino.

\* \* \*

**[RP15] Letter, dated June 12, 1981, from Roberta Ezratty to Francisco Nolla.**

[Condado Holiday Inn letterhead omitted in printing]

12, DE JUNIO DE 1981.

Ledo. Francisco Nolla, Director  
Juegos de azar  
Compania Fomento Turismo  
P.O. Box 3072  
San Juan, P.R. 00903

Re: Leisureguide

Dear Sir:

Leisureguide, a tourist geared hard covered book will be in the rooms of the Condado Holiday Inn for the coming year.

As you will note from the photocopy of the current cover, "Room Copy Do Not Remove" is clearly printed on the cover, my question is: Can we print Condado Holiday Inn Resort & Casino on the cover? I have indicated on the cover where it would appear. In addition, I would like to know whether we can write about the casino in certain pages which will appear *only* in the copies of The Condado Holiday Inn?

If copies are sent for by individuals neither the name of the hotel will appear on the cover, nor will the pages that include casino coverage.

I would appreciate your prompt reply since the editorial must go to the printer within the next 2 weeks.

Thank you for your kind cooperation,

\* \* \*

**[RP16] Letter of July 10, 1981, from Jorge Salas to Roberta Ezratty.**

[Tourism Company letterhead omitted in printing]

\*

Dear Ms. Ezratty:

In your letter, dated June 12, you requested authorization for various aspects concerning your casino advertisement to be printed on The Condado Holiday Inn Leisureguide.

Specifically you want authorization to:

- 1) Print on the front page of the Leisureguide, "Condado Holiday Inn Resort and Casino".
- 2) Include general information about the casino on the insert of The Condado Holiday Inn Leisureguide, only.
- 3) Include a picture of the casino on the insert of The Condado Holiday Inn Leisureguide, only.

As explained on your letters the Leisureguide is a hard covered book that will be available on The Condado Holiday Inn rooms and it will not be available to the general public, copies to be sent out will not be included on this authorization.

As per our telephone conversation, the picture of the casino to be included will be limited only to Black Jack table or any other table. Your request to include people playing in the casino is not approved.

Based on the information submitted to this Department and the restrictions on the distribution of this Leisureguide, this Department approves your petitions described above exclusively for the purpose requested.

\* \* \*

**[RP17] Letter, dated September 18, 1981, from P. M. Volonino to Mr. Leo Smith.**

[Condado Holiday Inn letterhead omitted in printing]

September 18, 1981

Mr. Leo Smith, Esq.  
Treasury Department  
Office of Special Investigations  
Intendente Ramirez Building  
San Juan, Puerto Rico

Dear Mr. Smith:

Enclosed please find our check number 2147 (Certified) for the amount of \$500.00 covering the fine levied upon us by the Tourism Company per their letter of August 31, 1981 (Copy attached).

I would like to state however, that we are paying this fine under protest, since we feel that U.P.I. and the press are the ones that were responsible for having photos placed in the various newspapers. Our intent was strictly to inform (verbally) to the people of Puerto Rico that, one third of the slot machines were being removed from the hotels, and the consequences thereof.

I appreciate your kind consideration in this matter.

Respectfully submitted,

P.M. VOLONINO  
Casino Controller

• • •

**[RP18] Letter of February 9, 1982, from Francisco Nolla Duran to Ms. Roberta Ezratty.**

[Tourism Company letterhead omitted in printing]

February 9, 1982

Ms. Roberta S. Ezratty  
Public Relations  
The Condado Holiday Inn  
999 Ashford Avenue  
San Juan, Puerto Rico 00902

Dear Ms. Ezratty:

In your telephone conversation with Mr. Jorge Salas last February 4, 1982, you explained him that the menus, were the Sands Casino logo is to be printed, are not available to the general public.

Therefore permission is granted to print Sands Casino as part of the Condado Holiday Inn logo on the menus located in the hotel.

Cordially yours,

FRANCISCO NOLLA DURAN  
Director  
Government Gaming Department

FND/wgp

[RP19] Letter of February 16, 1982, from P. M. Volonino to Francisco Nolla Duran, Gaming Director.

[Condado Holiday Inn letterhead omitted in printing]

•

Dear Attny. Nolla:

I am writing this letter for two reasons. First, we are hereby requesting permission to take photos in our casino on Friday February 19, 1982 for the purpose of printing new brochures for our property. As you are well aware, our brochures are printed in four versions, one in english and one in spanish without reference to our casino; and then one in english and one in spanish describing our casino facilities. The photographers and models would like to start at 10:00 a.m. to ensure that they would be out of the casino by 12:00 p.m., allowing adequate time for us to set up and open at 1:00 p.m.

Secondly, and perhaps the most important of all; when I wrote to you in January 28, 1982 requesting permission to allow the photographers from the "Free Club Magazine" to enter the casino (which you graciously permitted) I forgot to mentioned [sic] that the main purpose of that letter was to send to you our new stationary [sic]. Instead, the letter was typed on that stationary [sic], so I am attaching a sample of our new Sands Casino at the Condado Holiday Inn stationary [sic] for your review. I would greatly appreciate your comments so that we will know how to proceed.

I would appreciate your cooperation in the above matters and please do not hesitate to contact me if there are any questions.

• • •

[RP20] Letter of January 29, 1982, from Francisco Nolla Duran to Ruben C. Causa (Translation).

[Tourism Company letterhead omitted in printing]

(Translation)

January 29, 1982

Mr. Ruben C. Causa  
Casino Manager  
Condado Holiday Inn Hotel  
Ashford Avenue 999  
San Juan, Puerto Rico 00902

Dear Mr. Causa:

We hereby grant Mrs. Over Stragen authorization to take some photographs in the Casino of said Hotel on the 30th of January, 1982 at 10:00 A.M. The same must be used in the publication of a magazine in Belgium.

Pursuant to the Gaming Regulations, I would appreciate your sending me a copy of said photographs before they are published in the magazine.

Cordially,

(signed)  
FRANCISCO NOLLA DURAN  
Director  
Gaming Department

**[RP21] Letter dated March 3, 1982, from Roberta Ezratty to Mr. Jorge Salas.**

[Condado Holiday Inn letterhead omitted in printing]

March 3, 1982

Gaming Division  
Tourism Company  
Tourism Building  
301 San Justo Street  
San Juan, Puerto Rico 00905

Attention: Mr. Jorge Salas

Dear Mr. Salas:

It was a pleasure meeting with you the other day during our Casino filming. Thank you for your kind patience and cooperation.

I would like permission to print as part of our logo on the cover of Inside Puerto Rico, our quarterly in-house publication which is distributed only in our guest rooms, the following:

"The Condado Holiday Inn and Sands Casino"

Thank you for your assistance.

\* \* \*

**[RP22] Letter of March 8, 1982, from Francisco Nolla Duran to Roberta Ezratty.**

[Tourism Company letterhead omitted in printing]

March 8, 1982

Ms. Roberta S. Ezratty  
Public Relations  
Condado Holiday Inn Hotel  
Condado, Puerto Rico

Dear Ms. Ezratty:

In your letter dated March 3, 1982, you are requesting permission to print on the cover of your quarterly inhouse publication "Inside Puerto Rico": "The Condado Holiday Inn and Sands Casino".

Based on the information submitted by you in your letter, we require you change the captions to read as follows:

"The Sands Casino at the Condado Holiday Inn"

Cordially yours,

FRANCISCO NOLLA-DURAN  
Director  
Gaming Department

\* \* \*

**[RP23] Letter of April 29, 1982, to P.M. Volonino from Francisco Nolla Duran (Translation).**

[Tourism Company letterhead omitted in printing]

(Translation)

April 29, 1982

Mr. P. M. Volonino  
Casino Comptroller  
Condado Holiday Inn  
Ashford Avenue 999  
San Juan, Puerto Rico 00902

Dear Mr. Volonino:

We hereby authorize the taking of photographs of Miss Alba Nydia Diaz in the Casino of your Hotel. These photographs will be used for an article which will be published in the VEA magazine.

Mr. Alfonso Bonini, Supervisor of Inspectors, will be present during the taking of these photographs.

Having no other matters, I remain,

• • •

**[RP24] Letter of July 29, 1982, from Roberta S. Ezratty to Francisco Nolla Duran and Enclosure.**

[Condado Holiday Inn letterhead omitted in printing]

July 29, 1982

Lcdo. Francisco Nolla  
301 San Justo  
3er Piso  
Old San Juan, Puerto Rico 00901

Dear Lcdo. Nolla:

It was a pleasure talking with you this morning. Re my letter of July 21st, you have given us verbal approval to place a Sands Casino ad in Inn-Side Puerto Rico.

Enclosed is a copy of the proposed cover for Leisure-guide, a hard covered book which is placed in the guest rooms of hotels throughout Puerto Rico. As you will note, it states: "Room Copy. Please do not remove." The book will be distributed in November 1982 and be valid through October 1983.

We are requesting approval to place a Sands Casino at The Condado Holiday Inn ad in this publication, a copy of which is enclosed. Thank you for your kind cooperation. I shall look forward to seeing you next week.

• • •

[Enclosures omitted in printing]

**[RP 25] Letter of January 11, 1982, Regarding Report of the Gaming Enforcement Division and pages 118-119 of the Report.**

STATE OF NEW JERSEY  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
Division of Gaming Enforcement  
CN 047  
Trenton, New Jersey 08625

\* \* \*

January 11, 1982

Honorable Donald M. Thomas  
Acting Chairman  
Casino Control Commission  
3131 Princeton Pike  
Building 5  
Trenton, New Jersey 08625

RE: In re the Application of Greate Bay Hotel and Casino, Inc. t/a the Sands for Casino License, the Suitability of PPI Corporation, a New Jersey Corporation, as the Holding Company of Greate Bay Hotel Corporation, the Suitability of Inns of the Americas, Inc. as a Holding Company of PPI Corporation and the Reputation and Integrity of Thrift Credit Corporation as a Financial Source

Dear Acting Chairman Thomas:

Enclosed please find the final draft report and Statement of Issues regarding the license application in the above-captioned matter.

*[RP 25] Letter of January 11, 1982 Regarding Report of the Gaming Enforcement Division and pages 118-119 of the Report*

It is anticipated that the report and Statement of Issues will be filed next week.

Very truly yours,

G. MICHAEL BROWN  
Director

\* \* \*

[First two paragraphs of p. 118 omitted in printing]

e. Violations of Puerto Rican Gaming Regulations

#### 1. Advertising

Under Section 76 a-1 (7) of the gaming regulations promulgated by the Puerto Rican government, gaming advertising within Puerto Rico is forbidden. Further, any advertising of Puerto Rican gaming outside Puerto Rico and photographing and filming within a gaming parlor are subject to prior approval by the Department of Tourism. That department has fined the Condado Holiday Inn on two occasions for violating the foregoing regulation.

During 1978, the Department of Tourism warned the Condado Holiday Inn management regarding the advertising of its casino in telephone directories, newspapers and brochures. The Department of Tourism determined that the stationery at the Condado Holiday Inn facility, which stated "Condado Holiday Inn Hotel and Casino," constituted prohibited advertising. Further, the Department of Tourism determined that an advertisement purchased

*[RP 25] Letter of January 11, 1982 Regarding Report of the Gaming Enforcement Division and pages 118-119 of the Report*

by the casino employees' association at the Condado Holiday Inn, which appeared in a local paper and included a photograph showing a roulette wheel surrounded by players, constituted a violation of the afore-cited advertising regulation. The Condado Holiday Inn paid a \$1,500.00 fine to the Department of Treasury with regard to those violations.

Additionally, on July 31, 1981, Hugh Andrews, the manager of the Condado Holiday Inn facility, was photographed by the press while he held a mock funeral service for slot machines.\* The Department of Tourism fined the Condado Holiday Inn \$500 with regard to that photograph, and on September 14, 1981, the Condado Holiday Inn paid the amount of that fine to the Department of Treasury.

The Division has ascertained that the Department of Tourism is presently reviewing three other advertising matters pertinent to the Condado Holiday Inn. Those matters relate to two (2) advertisements in the Atlantic City Boardwalker and a promotion during the television pro-

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\* The Puerto Rican government has legislated the removal of slot machines from the casino facilities. The government required that the slot machines be removed as follows: 33 1/3% on August 1, 1981, 33 1/3% on December 1, 1981 and 33 1/3% on June 30, 1982. The governor of Puerto Rico postponed the December 1, 1981 slot machine removal until May 30, 1982 and the June 30, 1982 removal until July 30, 1982 by an administrative order dated August 31, 1981. That order affords the Puerto Rican Assembly an opportunity to reconsider the matter.

*[RP 25] Letter of January 11, 1982 Regarding Report of the Gaming Enforcement Division and pages 118-119 of the Report*

gram "Joker's Wild." The three instances occurred in 1981 and involved the mention of the "Condado Holiday Inn Hotel and Casino." The foregoing three advertisements were not submitted for the prior approval of the Department of Tourism as set forth in Section 76 a-1 (7) of the Puerto Rican gaming regulations.

**DOCUMENTARY EVIDENCE ON RECORD BY  
DEFENDANT (RD).**

**[RD 1] Letter of April 7, 1980, to Francisco Nolla Duran  
from Ruben C. Causa (Translation).**

[Condado Holiday Inn letterhead omitted in printing]

(Translation)

April 7, 1980

Mr. Francisco Nolla Duran, Director  
Puerto Rico Gaming Division  
Tourism Development Company  
San Juan, Puerto Rico

Dear Mr. Nolla:

I hereby request that you kindly authorize the Condado  
Holiday Inn casino to take photographs of the casino, for  
promotion in the capital of Argentina, by Mr. Mario  
Podesta of Status Magazine.

Many thanks for your attention.

With our cordial greetings,

\* \* \*

(Herein appears stamp of receipt by Tourism Company of  
April 8, 1980)

**[RD 2] Letter of April 8, 1980, to Francisco Nolla Duran  
from Ruben C. Causa (Translation).**

[Condado Holiday Inn letterhead omitted in printing]

(Translation)

April 8, 1980

Mr. Francisco Nolla Duran  
Puerto Rico Gaming Director  
Tourism Development Company  
San Juan, Puerto Rico

Dear Mr. Nolla:

I hereby wish to inform you that Mr. Jorge Saieg wishes  
to take some photographs in our casino at the Condado  
Holiday Inn Hotel for purposes of promotion in the city  
of Buenos Aires, Republic of Argentina.

I would appreciate your authorization for said  
photographs.

Many thanks for your attention.

With our cordial greetings,

\* \* \*

(Herein appears stamp of receipt by Tourism Company of  
April 9, 1980)

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**[RD 3] Letter of July 29, 1981, to Roberta S. Ezratty  
from Jorge A. Salas Gonzalez and Enclosure.**

[Tourism Company letterhead omitted in printing]

29 de julio de 1981

Roberta S. Ezratty  
Public Relations  
The Condado Holiday Inn  
999 Ashford Avenue  
San Juan, Puerto Rico 00902

Dear Ms. Ezratty:

According to your letter, dated July 16, 1981, you will be printing "Condado Holiday Inn Resort and Casino" on the "C'Est Magnifique" posters to be placed on the cruise ships. As you explained on the letter these posters will not be placed in other locations except for the cruise ships and will remain on board.

Subject to the adherence to the specific description explained on your July 16 letter, this Department approves your request.

\* \* \*

[Condado Holiday Inn letterhead omitted in printing]

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*[RD3] Enclosure to Letter of July 29, 1981, to Roberta S. Ezratty from Jorge A. Salas Gonzalez*

July 16, 1981

Lic. Francisco Nolla Duran  
Director of Gaming Department  
P. O. Box 4435  
Old San Juan Station  
Old San Juan, P.R. 00905

Dear Lic. Nolla:

For the posters re "C'Est Magnifique" that appear on the cruise ships and remain on board (never leave ship), can we put "Condado Holiday Inn Resort and Casino", rather than "Condado Holiday Inn Hotel and Resort".

We must have a reply immediately.

Thank you in advance for your kind cooperation and attention to this matter.

\* \* \*

[TC stamp of receipt July 15, 1981 Gaming Department]

[RD4] Letter of August 27, 1981, from Maria Milagros Soto to Pedro de Aldrey.

August 27, 1981

Mr. Pedro de Aldrey  
Executive Director  
Tourism Company  
P.O. Box 3072  
Old San Juan Station  
San Juan, Puerto Rico 00903

*Re: Condado Holiday Inn*

Good morning, Mr. de Aldrey!

As we have previously discussed, when considering other related matters, the holders of the Condado Holiday Inn gaming franchise have been actively seeking to establish hotel and casino facilities in Las Vegas and Atlantic City. Said facilities will operate under the trade name of The Sands Hotel at Las Vegas and The Sands Hotel at Atlantic City.

As a marketing device, the possibility of changing the trade name in San Juan to incorporate reference to the "Sands", in order to establish an identity and/or associative reaction in our clientele, was considered and rejected. The reason was that we anticipated legal problems arising from the fact that there is a Sands Hotel in Puerto Rico duly incorporated, although not operating a gambling parlor; and, the Department of State will not allow similar corporate or trade names.

However, since there is no provision in the Games of Chance Act or regulations prohibiting the use of special

[RD4] Letter of August 27, 1981, from Maria Milagros Soto to Pedro de Aldrey.

designation names of the casino, as has been the past practice in the designation of lounges, we feel we obtain the same sales or marketing objective by promoting in the United States and identifying the casino as "the Sands Casino at the Condado Holiday Inn Hotel".

Thus, although no promotion material has been printed yet, in all deference, I am hereby advancing to you my client's plans and our solution to the problem before mentioned. Of course, before any advertising brochure or material is published and distributed, we shall submit the proposed text for your approval and authorization as required by your regulations.

Cordially yours,

MARIA MILAGROS SOTO

\* \* \*

[RD5] Letter of September 30, 1981, from Pedro de Aldrey to Maria Milagros Soto, Esq. (Translation).

[Tourism Company letterhead omitted in printing]

(Translation)

September 30, 1981

Maria Milagros Soto, Esq.  
Banco Central and Economias Building  
Suite 1116  
Hato Rey, Puerto Rico 00917

Dear Attorney Soto:

I answer your letter of August 27, 1981 in which you request authorization to give a name to the casino of the Condado Holiday Inn Hotel for purposes of promotion, sales and marketing.

In view of the fact that what is requested falls within the terms allowed by the Gaming Law, we agree to your request. However, we would like to stress that any advertisement of those permitted by the Law must take into consideration that the casino is another department of the Hotel and therefore said facility shall never be allowed to advertise by itself for any reason whatsoever.

Any advertisement must be submitted for the prior approval in writing by the Company.

Cordially,

(signed)  
PEDRO De ALDREY

[Stamp omitted in printing]

\*\*\*

[RD6] Letter of January 4, 1982, from Roberta S. Ezratty To Tourism Company.

[Condado Holiday Inn Letterhead omitted in printing]

January 4, 1982

Compania Fomento de Turismo  
Juegos de Azar  
P.O. Box 3072  
San Juan, Puerto Rico 00903

Att: Mr. Jorge Salas

Re: Inside Puerto Rico

Dear Mr. Salas:

Enclosed is the copy we will be using for the article for the in-house publication for the Condado Holiday Inn on the Sands Casino.

I would appreciate your confirmation on its use.  
Thanking you,

\*\*\*

[Stamp omitted in printing]

P.S. Please note: photos of casino will be incorporated into article.

[RD7] Letter of January 20, 1982, from Francisco Nolla Duran to Roberta S. Ezratty and Enclosure.

[Tourism Company letterhead omitted in printing]

January 20, 1982

Ms. Roberta S. Ezratty  
Publicity Director  
The Condado Holiday Inn  
999 Ashford Avenue  
San Juan, Puerto Rico 00902

Dear Ms. Ezratty:

In your letter dated December 28, 1981, you requested permission to:

- (1) Place a photo of the Sands Casino at the Condado Holiday Inn on the cover of Inn Side Puerto Rico.
- (2) To have editorial information in your Casino incorporated into the magazine. (Draft submitted on January 4, 1982).

As per the information submitted in your letters "Inn Side Puerto Rico" is an *in-house publication not available to the general public*. In your telephone conversation with Mr. Salas you explained him that the photo to be use will be the same used on previous publications.

Subject to the information submitted to this Department and to the adherence of its motives, permission is granted to your request.

\* \* \*

[Condado Holiday Inn letterhead omitted in printing]

[RD7]- Enclosure to Letter of January 20, 1982, from Francisco Nolla Duran to Robert S. Ezratty

December 28, 1981

Compania Fomento de Turismo  
Juegos de Azar  
P.O. Box 3072  
San Juan, Puerto Rico 00903

Att: Sr. Jorge Salas

Re: Inn Side Puerto Rico

Dear Mr. Salas:

Pursuant to your phone conversation with Joel Magruder, publisher and editor of Inn Side Puerto Rico, we are requesting permission from Tourism for the following:

- 1) To place a photo of the Sands Casino at the Condado Holiday Inn on the cover of Inn Side Puerto Rico, our internal magazine placed in the hotel's guest rooms.
- 2) To have editorial information on our casino incorporated into the same magazine.

Inn Side Puerto Rico is not available to the general public.

Thank you for your cooperation.

\* \* \*

**[RD8] Letter of January 26, 1982, from P. M. Volonino  
to Atty. Francisco Nolla Duran and Enclosure.**

[Condado letterhead omitted in printing]

# EXECUTIVE OFFICES

January 26, 1982

Lcdo. Francisco Nolla, Director  
Compania de Fomento Turismo  
PO Box 4435—Old San Juan Sta.  
San Juan, Puerto Rico 00905

Estimado Lcdo. Nolla:

First of all, let me take this opportunity to wish you happy new year. I hope during the current year we can accomplish some of the goals that we have set to further both the Tourism and the Gambling Industry in Puerto Rico.

Attached please find a copy of an advertisement introducing our new "Sands Guarantee" program. The ad is to be featured in various travel trade publications, subject to your approval. As you can tell by reading the copy, it commits our Sands group to provide full satisfaction to our customers immediately, and if not, the client receives another room night free at one of our three hotel—casino properties.

*[RD8] Letter of January 26, 1982, from P.M. Volonino  
to atty. Francisco Nolla Duran and Enclosure*

Also attached is a copy of our "Sands Line" brochure that will be mailed strictly to Sands established customers and will be published in a newsletter type format. The newsletter will give coverage to entertainment, sports events, special tournaments and special events at our Sands properties. We are requesting permission for the page that will show all three properties that comprise our Sands family.

Your prompt reply will be greatly appreciated.

\* \* \*

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*[RD8] Enclosure to Letter of January 26, 1982, from  
P.M. Volonino to Atty. Franciso Nolla Duran and  
Enclosure*

# Introducing the Sands Guarantee. No problems. No hassles. No complaints.

## THE SANDS GUARANTEE

You, your customer, your group, company, or organization will love how it feels at the Sands.  
If you don't, it's wasn't an absolutely perfect experience, come back again next year and stay at any of our three properties on us.  
For every room night that isn't perfect, tell us. If we don't resolve the complaint and provide full satisfaction right then and there, we'll give you your customer, your group, company or organization another room night free, no questions asked, next year at the Sands Casino-hotel of your choice.  
Your guarantee is good for one year from the date of your last room night, and can be redeemed during the following months:  
The Sands Hotel & Casino, Atlantic City — December-April  
The Sands Hotel & Casino, Las Vegas — June-August  
December  
The Conrado Holiday Inn & Sands Casino, Puerto Rico — May-November.  
For complete details or further information, call our Hotel Sales Director at 800-257-8580. In N.J. call 800-582-7699.

  
**Sands**  
HOTELS AND CASINOS  
ATLANTIC CITY, LAS VEGAS, PUERTO RICO

666/110-109 & 111

[RD9] Letter of January 28, 1982, from P. M. Volonino  
to Atty. Francisco Nolla Duran.

[Condado letterhead omitted in printing]

EXECUTIVE OFFICES

January 28, 1982

Lcdo. Francisco Nolla, Director  
Compania de Fomento Turismo  
PO Box 4435—Old S. J. Station  
San Juan, Puerto Rico 00905

Dear Lcdo. Nolla:

I am writing this letter on behalf of a group of people that represent "FreeClub" magazine that are based in Belgium. The brochure style magazine is *distributed free* by clothing retailers that have imprinted their company name on the copy, similar to the system used by many travel agents. Mrs. Janet Colon of the Tourism Company is helping to coordinate their stay here.

The group is in Puerto Rico to take photos of the island as well as our hotel, using their models that are wearing their "light-weight" line of clothing. The slides that I have seen taken by their photographer are all first quality.

What we are requesting is that they be permitted to take photos of that [*sic*] models in our casino on Saturday morning, between the hours of 9:00 a.m. to 10:30 a.m., where the main object is the clothing and merely using the casino as a back-drop for effect.

Since time is essence [*sic*] , I hope you can give this matter your prompt attention.

\* \* \*

**[RD10] Letter of January 29, 1982, from Francisco Nolla Duran to Ruben C. Causa Enclosing Letter of January 28, 1982 from Roberta S. Ezratty to Francisco Nolla Duran (Translation).**

[Tourism Company letterhead omitted in printing]

(Translation)

January 29, 1982

Mr. Ruben Causa  
Casino Manager  
Condado Holiday Inn Hotel  
Ashford Avenue 999  
San Juan, Puerto Rico 00902

Dear Mr. Causa:

We hereby authorize Mrs. Over Stragen to take some photographs in the Casino of said Hotel on January 30, 1982 at 10:00 A.M. These must be used in the publication of a magazine for Belgium.

I would appreciate your sending me copy of said photographs before these are published in the magazine, pursuant to the Gaming Regulation.

\* \* \*

*[RD10] Enclosure to Letter of January 29, 1982, from Francisco Nolla Duran to Ruben C. Causa*

The Condado Holiday Inn

January 28, 1982

Mr. Francisco Nolla  
Director of Gaming Department  
Tourism Department  
Banco de Ponce—2nd floor  
Old San Juan, Puerto Rico

Dear Mr. Nolla:

The following is to ask from you a permission to film the Casino on Saturday, January 30, 1982 at 8:00 a.m. The pictures will be used for a Belgium travel and fashion magazine called the Free Press Club. The lady in charge of this project is Ms. Jacqueline Overstratten. We are in complete knowledge and acceptance of what they will shoot and by this means ask for your permission to go ahead on Saturday morning.

Sincerely,

ROBERTA S. EZRATTY  
Public Relations Director

RSE:hva

88a

**[RD11] Letter of February 9, 1982, from Francisco Nolla Duran to Roberta S. Ezratty Enclosing Letter of February 3, 1982 from Roberta S. Ezratty to the Tourism Company.**

[Tourism Company letterhead omitted in printing]

February 9, 1982

Ms. Roberta S. Ezratty  
Public Relations  
The Condado Holiday Inn  
999 Ashford Avenue  
San Juan, Puerto Rico 00902

Dear Ms. Ezratty:

In your letter dated February 3, 1982, you requested permission to include a casino photograph in the posters placed exclusively at the cruise ships.

Subject to the same restrictions of our July 29, 1981 authorizations your request is authorize *[sic]*.

\* \* \*

89a

*[RD11] Enclosure to Letter of February 9, 1982, from Francisco Nolla Duran to Roberta S. Ezratty*

THE CONDADO HOLIDAY INN

February 3, 1982

Tourism Company  
P.O. Box 4435  
Old San Juan Station  
San Juan, P.R. 00905

Att: Mr. Jorge A. Salas Gonzalez

Dear Mr. Salas:

In reference to your letter of 7/29/81, which is enclosed; you gave us permission for a sign to include "Condado Holiday Inn Resort and Casino" for the cruise ships.

May we also include a photograph of the Condado Holiday Inn Casino on the same signs?

Thank you for your kind attention,

\* \* \*

**[RD12] Letter of March 3, 1982, from Francisco Nolla  
Duran to Pat Volonino.**

March 3, 1982

Mr. Pat Volonino  
Casino Comptroller  
Condado Holiday Inn Hotel  
Condado, Puerto Rico

Dear Mr. Volonino:

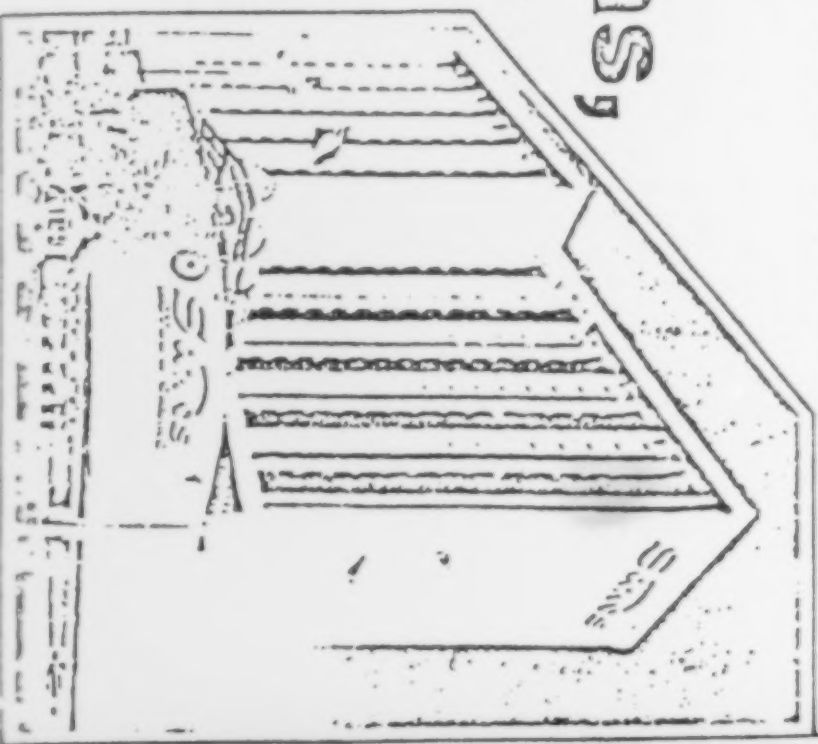
We have received the ad sent to this Department for approval. As explained in your March 2 letter this ad will be run exclusively in the Miami area.

We approve the refered ad to be run in the Miami area.

\* \* \*

*NY*

# Now the Sands makes it easy to visit our Las Vegas, Atlantic City and Puerto Rico resorts.

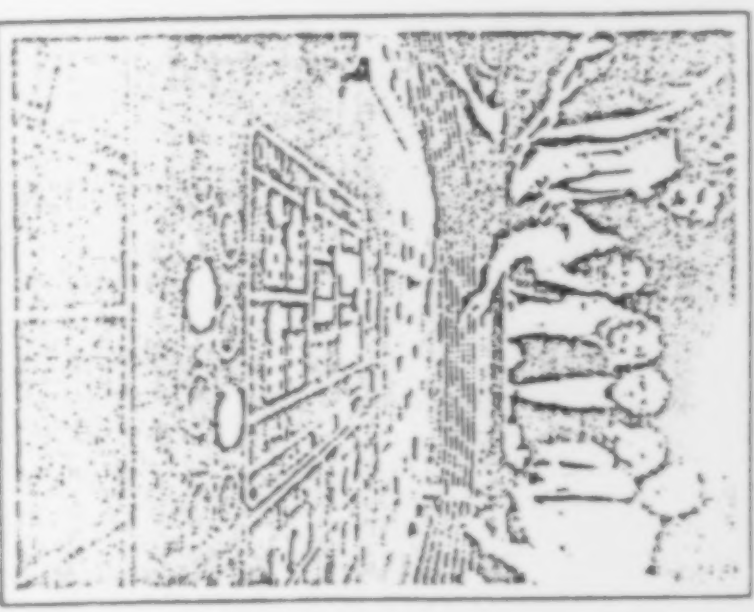


## Our Miami office is the reason why.

The Sands Miami office is available to make it more convenient for you to reach our three spectacular resort complexes—Las Vegas, Atlantic City and in the Condado Holiday Inn, San Juan, Puerto Rico.

If you qualify for our V.I.P. Flight, we'll arrange an experience of gourmet dining, exciting lounges, high-voltage entertainment and fast-paced casino action you'll remember for years to come. And it's all on us, except the gaming, of course.

Just telephone (305) 591-7144 for information on this, and our other exciting V.I.P. Flights.



YOU'LL LOVE HOW IT FEELS!

*City  
Nette*

[RD12] *Letter of March 3, 1982, from Francisco Nolla  
Duran to Pat Volonino.*

92a

**[RD13] Letter of May 5, 1982, from Francisco Nolla  
Duran to Ruben C. Causa Enclosing Letter of May 25,  
1982 (Translation).**

[Translation of text of letter]

May 5, 1982

Mr. Ruben Causa  
Casino Director  
Condado Holiday Inn Hotel  
Ashford Avenue 999  
San Juan, Puerto Rico 00902

Dear Mr. Causa:

We hereby authorize Mr. Tito Rosario of Fantasy World Tours to take some photographs to be used in a documentary. These photographs shall be taken on Wednesday, May 26, 1982 at 10:00 A.M.

Mr. Alfonso Bonini, Supervisor of Inspectors, will be present during the taking of these photographs.

I am at your orders for any question you may have on this matter.

\* \* \*

93a

*[RD13] Enclosure to Letter of May 5, 1982, from  
Francisco Nolla Duran to Ruben C. Causa*

THE CONDADO HOLIDAY INN

May 25, 1982

Lcdo. Francisco Nolla  
Tourism Department  
Gaming Division  
Box 4435  
San Juan, Puerto Rico

Dear Lcdo. Nolla:

As per the conversation between Wilma Gonzalez and Tito Rosario, owner of Fantasy World Tours, verbal approval was obtained to photograph the Sands Casino on May 26, 1982 at 10:00 a.m.

The purpose of this photograph session is to incorporate a picture of the Sands Casino in Fantasy World Tours brochures of San Juan.

Would you be kind enough to sign this letter where indicated?

Thank you for your kind cooperation.

\* \* \*

RSE:hva

Agreed by: \_\_\_\_\_  
Tourism Company; Gaming Division

**[RD14] Letter of July 9, 1982, to Bartolo Vargas from  
Francisco Nolla Duran (Translation).**

(Translation of text of letter)

July 9, 1982

Mr. Bartolo Vargas  
Casino Director  
Condado Holiday Inn Hotel  
Ashford Avenue 999  
San Juan, Puerto Rico 00902

Dear Mr. Vargas:

We hereby authorize Miss Roberta Ezratty, Public Relations Director of the Condado Holiday Inn to take some photographs. These photographs will be taken on Monday, July 12, 1982 at 10:30 A.M.

The photographs will be used for the "American Express Travel Destination Magazine", pursuant to Miss Ezratty's request. Mr. Jose R. Rodriguez, Supervisor of Inspectors, will be present during the taking of these photographs.

I am at your orders if any question should arise as to this matter.

\* \* \*

*[RD14] Letter of July 9, 1982, to Bartolo Vargas from  
Francisco Nolla Duran (Translation)*

THE CONDADO HOLIDAY INN

July 2, 1982

Lic. Francisco Nolla  
Compania de Turismo  
Depto. Juegos de Azar  
San Justo 301—3er Piso  
Viejo San Juan, P.R. 00901

Dear Lic. Nolla:

We are requesting permission to take photographs at the Sands Casino at the Condado Holiday Inn on July 12 from 10:30 a.m.-12:00 for an American Express Travel Destination Magazine.

Thank you for your kind interest and cooperation.

\* \* \*

**[RD15] Letter of July 20, 1982, to Maria M. Soto from Francisco Nolla Duran and Enclosure.**

Tourism Building  
301 San Justo Street  
P. O. Box 3072  
Old San Juan Station  
San Juan, Puerto Rico 00903  
Tel. (809) 721-2400

July 20, 1982

Mrs. Maria Milagros Soto  
Suite 1116  
Banco Central y Economias Building  
Hato Rey, Puerto Rico 00917

Dear Mrs. Soto:

As approved by our telephone conversation, your client may use the name Condado Holiday Inn Resort and Sands Casino in the promotional literature.

It is for promotional use outside Puerto Rico only.

Cordially yours,

FRANCISCO NOLLA DURAN  
Director  
Government Gaming Department

FND/v gp

**[RD15] Enclosure to Letter of July 20, 1982, to Maria M. Soto from Francisco Nolla Duran**

MARIA MILAGROS SOTO

ATTORNEY AT LAW

Tel. (809) 754-1920

June 3, 1982

Mr. Francisco Nolla  
Gaming Director  
Tourism Company  
Box 3072  
San Juan, Puerto Rico 00903

Re: Condado Holiday Inn

Dear Mr. Nolla:

On April 26, 1982 we formally requested your authorization to use reference to the "Condado Holiday Inn Resort & Sands Casino" in our promotional literature. We also enclosed a copy of a beautiful brochure that, with your consent through a telephone conversation with me, we began to use on May 1, 1982 when the new betting limits took effect.

Inasmuch as we have not received a formal written authorization to this effect, I want to confirm our conversation and your authorization which took place on the same day the letter was sent to you by hand.

As always,

MARIA MILAGROS SOTO

**[RD16] Letter of October 19, 1982, to Bartolo Vargas from Francisco Nolla Duran (Translation) and Another from Bartolo Vargas to Francisco Nolla Duran (Translation).**

(Translation of text of letter.)

October 19, 1982

Mr. Bartolo Vargas  
Casino Director  
Condado Holiday Inn Hotel  
Ashford Avenue 999  
San Juan, Puerto Rico 00902

Dear Mr. Vargas:

I hereby confirm our conversation in which I approved the use of glass in the front wall of the casino. With respect to your request for a "Change Girl", it is approved in principle, but I would like to discuss with you this person's method of work.

Having no other matters at present, I remain,

Cordially,

\* \* \*

*[RD16] —Letter of October 19, 1982, to Bartolo Vargas from Francisco Nolla Duran (Translation) and Another from Bartolo Vargas to Francisco Nolla Duran (Translation)*

(Translation of text of letter)

October 14, 1982

Mr. Francisco Nolla Duran, Esq.  
Director  
P. R. Gaming Division  
Tourism Development Company  
Box 4435  
Old San Juan, P.R. 00905

Dear Attorney Nolla:

I would hereby like to confirm our conversation of October 13 of this month, in which we received your authorization to use glass as a divider between the hall and the right side of the casino, which will extend up to the bridge which joins the two buildings which comprise the Condado Holiday Inn. On that occasion we were also authorized by you to implement in our casino the change machines for the slot machines, and to use "exchange girls" which would offer our clients the facility of obtaining change for the slot machine without having to recur to the casino cashier.

In view of the fact that we did not have the necessary time to discuss these improvements and services in depth, I would appreciate your indicating any additional requirement which may be necessary to implement these services and improvements as soon as possible.

Thank you once more for your customary cooperation.

\* \* \*

[RD17] Memorandum of November 17, 1982, from Jose Mendez to Francisco Kortright (Translation).

CONDADO  
HOLIDAY INN RESORT  
& SANDS  
CASINO  
San Juan, Puerto Rico

MEMORANDUM

Date November 17, 1982

TO Mr. Francisco Kortright  
FROM Mr. Jose Mendez  
SUBJECT Holidays during Christmas

---

We hereby inform you that as in previous years the Casino of the Condado Holiday Inn will remain closed only during the 31st of December, 1982.

cc: H. Andrews

(stamp of receipt of Tourism  
Company on Nov. 18, 1982)

[R71] Informative Motion in Compliance with Courtroom Order, Dated December 13, 1983, and its Exhibits A, B & C (Translation and Facsimile).

[Filed Dec. 13, 1982, caption omitted in printing]

TO THE HONORABLE COURT:

Comes now petitioner in the above captioned case, represented by its undersigned attorney and respectfully informs and requests:

1. In the hearing held on November 24, 1982, we presented into evidence the advertisements of the million dollar Lottery corresponding to May, September and December of 1982. The Honorable Court requested the written copy of said advertisement, which we include herein as Exhibit A to this motion.

2. In addition, the Honorable Court requested the attorneys of the parties to provide the citations of the laws applicable to the case in controversy. We inform this Honorable Court that applicable to the controversy are Sections 1, 4, 6, 7, and 20 of Article II of the Constitution of the Commonwealth of Puerto Rico; amendment I, V and XIV of the Constitution of the United States of America; Act Number 221 of May 15, 1948, as amended, 15 LPRA, sec. 71 *et seq.*; Act Number 10 of June 18, 1970, 23 LPRA Sec. 671, *et seq.*, Rule 59 of Civil Procedure of 1979 and the Gaming Regulation, as amended, 15 RRPR, 76-1, *et seq.*

3. At the November 30, 1982 hearing, we requested this Honorable Court to take judicial notice that El Comandante and other games of chance are advertised in Puerto Rico. After that date, and specifically on Tuesday, December 7,

*Informative Motion in Compliance with Courtroom Order,  
Dated December 13, 1983, and its Exhibits A, B & C  
(Translation and Facsimile)*

1982, an advertisement was published in the El Nuevo Dia with the photograph of a player who with a \$24.00 ticket had won a \$139,510.80, pool on Friday, September 24, 1982, free of tax. Exhibit B. The advertisement contains the message: "To win, you have to gamble." We include copy of the aforementioned ad and are sending copy of same to our fellow counsellors, who represent defendant and intervenor herein.

WHEREFORE we respectfully inform this Honorable Court that we have complied with supplying the information which was requested and pray that it take judicial notice of the specific advertisement.

[Certificate of Service omitted in printing]

\* \* \*

APPENDIX A

[Letterhead of Joe Franco & Associates, Inc., Copy]

PRODUCT: EXTRAORDINARY DRAWING  
PROMOTION:  
CLIENT: BUREAU OF THE LOTTERY  
MEDIA: TV  
DESCRIPTION: TV SPOT  
DATE September 1982 JOB NO.

*Informative Motion in Compliance with Courtroom Order,  
dated December 13, 1983, and its Exhibits A, B & C  
(Translation and Facsimile)*

JINGLE: Here's another million dollar lottery.  
which you can also win  
since luck hits everyone  
but gamble, gamble, gamble  
since only gambling can you win.

EMCEE: Come on, play in the Million  
Dollar lottery of September 6  
this is your great opportunity to  
win a whole lot  
buy your ticket on time.

JINGLE: GAMBLE, GAMBLE, GAMBLE  
SINCE ONLY GAMBLING CAN YOU WIN.

APPENDIX B

[Letterhead of Joe Franco & Associates, Inc., Copy]

PRODUCT: CHRISTMAS 1982 DRAWING  
PROMOTION:  
CLIENT: BUREAU OF THE LOTTERY  
MEDIA: TV  
DESCRIPTION: TV SPOT  
DATE: JOB NO.

GIRL: There are 6 this Christmas

*Informative Motion in Compliance with Courtroom Order,  
dated December 13, 1983, and its Exhibits A, B & C  
(Translation and Facsimile)*

Man: Six what?  
Girl: Six one million dollar prizes.  
V.O.: That's fabulous, the Lottery of this  
Christmas has six one million dollar prizes.  
More opportunities for you to win.  
Buy your ticket, don't get left out  
of the December 19 Christmas drawing.

JINGLE: The Lottery can give you  
what you need this Christmas.  
Go ahead, buy your ticket  
you might even win a million.

APPENDIX C

[Page 22, El Nuevo Dia, Tuesday, December 7, 1982]

(Photograph of winner)

FRANCISCO VEGA MADE  
THE INVESTMENT OF HIS LIFE.

He invested \$24.00 and received  
\$139,510.80  
tax-free.  
(Not bad, right?)

Francisco Vega played a \$24.00 ticket and hit the pool in  
the races of Friday, September 24, 1982.

You have to gamble to win.

Your fund and your fortune await in

EL COMANDANTE

Visit your Favorite OTB Parlor

(drawing of racing horses)

**[R154] Motion in Opposition to New Evidence, Dated De-  
cember 24, 1982 (Translation).**

[Received December 24, 1984, caption omitted in printing]

TO THE HONORABLE COURT:

Comes now the Secretary of Justice, represented by its  
undersigned attorneys and respectfully States, Alleges and  
Prays:

1. On December 20, 1982 we received copy of an Infor-  
mative Motion in Compliance with Order filed before this  
Honorable Court by petitioner.

2. That together with said Motion there is enclosed new  
evidence which was not presented at the hearing of the case  
in its merits nor offered to be presented after the hearing  
with the approval of this Court and this appearing party.

3. We object for all pertinent legal purposes to the evi-  
dence and the corresponding allegations in paragraph three  
(3) of the aforementioned Motion.

RESPECTFULLY SUBMITTED.

[Certificate of Service omitted in printing]

\* \* \*

**[R156] Motion in Support of New Evidence, Dated December 27, 1982 (Translation).**

[Filed Dec. 27, 1982, caption omitted in printing]

**TO THE HONORABLE COURT:**

Comes now plaintiff represented through its undersigned attorney and respectfully STATES, ALLEGES and PRAYS to this Honorable Court:

1. On March 12, 1982 we filed a complaint for Declaratory Judgment.
2. In paragraph 8(C) of the complaint we requested that this Honorable Court take judicial notice that other games of chance, such as the lottery, horseraces and cock fights are allowed to advertise in Puerto Rico, while casinos are forbidden to advertise.
3. The judicial knowledge that we requested in our complaint is of facts and of law.
4. That in the hearing in its merits of our case we introduced into evidence some of the advertisements of the Puerto Rico Lottery and again requested the Honorable Court to take judicial notice that the Racing Law and other laws allowed advertisements in Puerto Rico; and that, in fact, the racetrack was not only transmitting the horse races, but was circulating racing cards in its agencies for the corresponding bets and was publishing advertisements in the newspapers.

*Motion in Support of New Evidence, Dated December 27, 1982 (Translation)*

5. Defendant never raised an objection to our request to the Honorable Court regarding judicial knowledge as to the facts, nor as an allegation to the complaint, nor at the hearing when it had the opportunity to make its corresponding allegations.

6. Rule 11 of Evidence of 1979 allows the courts to take judicial knowledge of facts that are not reasonably subject to controversy since they are generally known within the territorial jurisdiction of the court or because they are susceptible to immediate and exact determination by recurring to sources whose correctness cannot be reasonably questioned.

All that Rule 11 requires when judicial notice is taken at the request of a party is that it notify the request to the adverse party so that it may prepare itself and contest the request if it so deems convenient.

We complied with the requirements of Rule 11(C) and the adverse party did not present an objection to our request.

7. Rule 11(D) provides that the courts may take judicial notice in any stage of the proceedings, including the appellate stage. Our request for judicial knowledge is not in any manner limited to the conclusion of the hearing, but it is continuous until the controversy is adjudicated. Therefore, our motion of December 20, 1982 is in accordance to the law, and the only thing we did in accompanying copy of an advertisement which was published after the date of the hearing was to facilitate to the Court the search for that information, since otherwise it would have had to recur to the edition of the corresponding newspaper.

*Motion in Support of New Evidence, Dated December 27,  
1982 (Translation)*

8. On the other hand, Rule 12 of Evidence allows the courts to take judicial notice of the applicable laws and the jurisprudence in Puerto Rico.

9. The Secretary of Justice does not specify the basis for his opposition to the request for judicial notice of facts and the law, despite their being of general knowledge, correct and susceptible to corroboration about their correctness, notified since the filing of the complaint without any opposition whatsoever, arose after the hearing, which is the reason why we did not submit them at said time, but before the appellate stage, and directly related to the applicable law, which is stated in detail in our Memorandum of Authorities already filed in this Honorable Court.

WHEREFORE we respectfully request that this Honorable Court deny the motion in opposition of the Honorable Secretary of Justice and take judicial notice of the opposed advertisement, and on a continuing basis of any other advertisement which it is made aware of prior to the sentence of this Honorable Court.

[Certificate of Service omitted in printing]

\* \* \*

**[R228] Motion re: Post-Trial Evidence, Dated October 26,  
1983 (Translation).**

[Filed on Oct. 26, 1983, caption omitted in printing]

**TO THE HONORABLE COURT:**

Comes now plaintiff through its undersigned attorney and respectfully requests and prays:

1. The present case has been submitted to the Honorable Court and is pending determination.

2. Pursuant to Rule 11(D) of the Rules of Civil Procedure in effect, the Court may take judicial notice in this stage of the proceedings of facts susceptible to immediate and exact determination by recurring to sources whose correctness cannot be reasonably questioned.

3. Today, October 25, 1983, we became aware of the publication corresponding to the month of October 1983 of "Que Pasa," an official guide for visitors to Puerto Rico.

4. The "Que Pasa," as appears from the information under the table of contents in the first page of the enclosed edition (Exhibit A), is published monthly by the Puerto Rico Tourism Company and is distributed within and without Puerto Rico free of charge as a tourist service.

5. We request that this Honorable Court take judicial notice of the advertisement which appears on the page which we have marked as number 92, since the pages are not all numbered. On this page there appears an advertisement by the Condado Beach, and next to it, an advertisement by plaintiff.

*Motion re: Post-Trial Evidence, Dated October 26, 1983  
(Translation)*

6. The Tourism Company, despite the absolute prohibition of Section 8 of Law 221 of 1948, of its regulations, administrative guidelines and briefs in this case, has not only allowed an advertisement by the Casino of the Condado Beach Hotel, but has included it as part of its official tourism information guide. Said advertisement is conspicuous since it is the first amenity advertised by the Condado Beach Hotel.

7. We request of this Honorable Court that it take judicial notice that the aforementioned hotel is owned by the government, specifically the Puerto Rico Industrial Development Company.

8. Next to it, on page 93, appears the advertisement of the Condado Holiday Inn, which is *not* allowed to advertise its casino, as appears from the record, and which has been fined in three cases, remotely related to advertising the gaming room, as extensively argued in our writs before this Honorable Court.

9. To endorse the advertisement of one casino, owned by the government, although managed by a private enterprise which receives a compensation from the government for its services, while plaintiff, which is a totally private enterprise, is not allowed to advertise, constitutes a vivid example of a suspicious classification which violates due process of the law and the equal protection of the law warranting the strictest judicial scrutiny.

10. The advertisement allowed to the Condado Beach Hotel is a vivid example of the inconsistent, arbitrary and capricious manner in which defendant interprets and enforces the gaming law.

*Motion re: Post-Trial Evidence, Dated October 26, 1983  
(Translation)*

WHEREFORE, we respectfully request from this Honorable Court that if it is still not convinced of the applicability of the various constitutional allegations and evidence in the record in favor of plaintiff's position, it should carefully analyze the facts which we bring to its judicial knowledge, immediately verifiable by the best source to determine the correctness of our allegations—the official tourist guide of defendant—and declare Section 8 of the Gaming Law unconstitutional and its application arbitrary and unreasonable, as we have argued *ante*.

[Certificate of service omitted in printing]

\* \* \*

[Exhibit A appears on pages 228-230 of the original record in the English language.]

**Page 38b of the Jurisdictional Statement's Exhibit B—  
Declaratory Judgment to Correct Printing Error of  
Paragraph (7) of Section 1 of Gaming Regulations.**

**"SECTION 1. CONCESSIONAIRES**  
.....

(1) ....

(2) ....

(3) ....

(4) ....

(5) ....

(6) ....

(7) Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos.

We hereby authorize the publicity of the casinos in newspapers, magazines, radio, television or any other publicity media, of our games of chance in the exterior with the previous approval of the Tourism Company regarding the text of said ad, which must be submitted in draft to the Company. Provided, however, that no photographs may be taken nor movies be filmed within the casino for said advertisements without the approval of the Company.

We hereby allow, within the jurisdiction of Puerto Rico advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident. Within the ads of casinos allowed by this regulation figure, for illustrative purposes only, advertising distributed or placed in landed airplanes or cruise ships in jurisdictional waters and in restricted

**Notice of Appeal, Dated March 29, 1985 (Translation),  
Filed in the Superior Court, San Juan Section.**  
[Caption only].

TRANSLATION

IN THE

SUPREME COURT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

Case No. 0-85-14

**DECLARATORY JUDGMENT OF THE SUPERIOR COURT,  
SAN JUAN SECTION**

Civil Case No. 82-1508

Appeal.

Puerto Rico  
Superior Court  
Stamp of Filing Date:

Received  
San Juan Judicial Center  
Clerk's Office—Civil  
General Affairs Division  
March 29, 4:16 P.M. '85

*Notice of Appeal, Dated March 29, 1985 (Translation),  
Filed in the Superior Court, San Juan Section.*

WRIT OF APPEAL

MARIA MILAGROS SOTO  
Attorney for Appellant  
Banco Central, Suite 815  
Hato Rey, P.R. 00917  
Tels. 754-1920/1717

JUAN M. CORREA SUAREZ  
Attorney for Appellee  
Box 4435  
Old San Juan Station  
San Juan, P.R. 00905  
Tel. 721-2400

JOSE ALBERTO MOURE  
Attorney for Secretary of Justice  
Box 192  
San Juan, P.R. 00902  
Tel. 721-2900

**Notice of Appeal, Dated March 29, 1985 (Translation),  
Filed in the Supreme Court of Puerto Rico.**

TRANSLATION

IN THE

SUPREME COURT OF PUERTO RICO

POSADAS DE PUERTO RICO ASSOCIATES D/B/A Con-  
dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

Case No. 0-85-14

DECLARATORY JUDGMENT OF THE SUPERIOR COURT,  
SAN JUAN SECTION

Civil Case No. 82-1508

Appeal.

Puerto Rico Supreme Court 1985 March 29 2:56 P.M.  
Stamp of Filing Date: Filed Clerk's Office  
Supreme Court of  
Puerto Rico

*Notice of Appeal, Dated March 29, 1985 (Translation),  
Filed in the Supreme Court of Puerto Rico*

# WRIT OF APPEAL

MARIA MILAGROS SOTO

Attorney for Appellant  
Banco Central, Suite 815  
Hato Rey, P.R. 00917  
Tels. 754-1920/1717

JUAN M. CORREA SUAREZ

Attorney for Appellee  
Box 4435  
Old San Juan Station  
San Juan, P.R. 00905  
Tel. 721-2400

JOSE ALBERTO MOURE

Attorney for Secretary of Justice  
Box 192  
San Juan, P.R. 00902  
Tel. 721-2900

*Notice of Appeal, Dated March 29, 1985 (Translation),  
Filed in the Supreme Court of Puerto Rico*

TRANSLATION

IN THE

SUPREME COURT OF PUERTO RICO

— ● —

POSADAS DE PUERTO RICO ASSOCIATION D/B/A Con-  
dado Holiday Inn,

*Plaintiff-Appellant,*

vs.

TOURISM COMPANY OF PUERTO RICO,

*Defendant-Appellee.*

Case No. 0-85-14

APPEAL FROM THE SUPERIOR COURT, SAN JUAN  
SECTION

Declaratory Judgment.

— ● —

NOTICE OF APPEAL  
TO

SUPREME COURT OF THE UNITED STATES  
TO THE HONORABLE SUPREME COURT OF PUERTO  
RICO:

Appellant respectfully appears herein represented by its  
subscribing attorney to inform this Honorable Supreme  
Court of the appeal to the Supreme Court of the United

*Notice of Appeal, Dated March 29, 1985 (Translation),  
Filed in the Supreme Court of Puerto Rico*

States, within the legal term, of the Resolution of March 7, 1985, denying our Motion for Reconsideration filed on February 22, 1985 regarding the Resolution dated February 7, 1985 of this Honorable Court dismissing the appeal of the Declaratory Judgment issued by Honorable Judge Guillermo Arbona Lago on December 12, 1984 since it failed to present a substantial constitutional question.

The appeal filed is valid pursuant to the jurisdiction of the Honorable Supreme Court to revise the judgments and orders of this High Court when it raises the issue of the nullity of a statute of the Commonwealth of Puerto Rico for being repugnant to the Constitution of the United States of America and its validity has been sustained (28 U.S.C. sec. 1258).

In San Juan, Puerto Rico, March 29, 1985.

(signed)

MARIA MILAGROS SOTO  
Banco Central—Suite 815  
221 Ponce de Leon Ave.  
Hato Rey, Puerto Rico 00917

CERTIFICATION: On this same date I have filed a copy of the writ of appeal with the Clerk of the Superior Court, San Juan Section, pursuant to Rule 10 of the Supreme Court of the United States and I have notified appellee by certified mail and the Secretary of Justice at its address of record and through the legal representative of the parties in this proceeding.

(signed)

MARIA MILAGROS SOTO  
Banco Central—Suite 815  
221 Ponce de Leon Ave.  
Hato Rey, Puerto Rico 00917

**United States Supreme Court Order of October 21, 1985  
Postponing the Question of Jurisdiction to the Hearing  
of the Case on the Merits.**

SUPREME COURT OF THE UNITED STATES

No. 84-1903

POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a Condado Holiday Inn,

*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO.

APPEAL from the Supreme Court of Puerto Rico

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

October 21, 1985

**Motion to the Supreme Court of Puerto Rico Requesting  
Certificate that Federal Question was Raised.**

TRANSLATION

IN THE  
SUPREME COURT OF PUERTO RICO

————— ● —————  
POSADAS DE PUERTO RICO ASSOCIATES, INC. d/b/a  
Condado Holiday Inn,

*Plaintiff-Appellant,*

vs.

PUERTO RICO TOURISM COMPANY,

*Defendant-Appellee.*

Appeal from the Superior Court of PR San Juan Section

Declaratory Judgment

085-14

————— ● —————  
MOTION

*Motion to the Supreme Court of Puerto Rico Requesting  
Certificate that Federal Question was Raised*

TO THE HONORABLE SUPREME COURT OF PUERTO  
RICO:

Now comes plaintiff-appellant, Posadas de Puerto Rico Associates, Inc., through the undersigned attorney and respectfully states and requests:

1. On June 4, 1985 Posadas filed in the Supreme Court of the United States a writ entitled "Jurisdictional Statement" in support of its appeal in this case before said High Court.

2. On October 21, 1985 the Honorable Supreme Court issued a Resolution accepting the appeal but reserving its determination regarding jurisdiction until argumentation on the merits. In this type of case there is still pending the burden of the evidence regarding jurisdiction of the court on appellant, with the disadvantage that we do not know for sure what jurisdictional aspect may concern the Honorable Justices of the Supreme Court of the United States.

3. In the discharge of our responsibility, and although we raised the constitutional issue since the original stage at the administrative level through letter of February 24, 1982, in the Complaint of March 12, 1982, in our oral argument before the lower Court, in the Memorandum of Authorities and in the Memorandum of Reply, filed before the Superior Court, in the Writ of Appeal to the Supreme Court of Puerto Rico filed in the Superior Court, and directly before this Honorable Court through our Motion for Reconsideration, all of which appears from the

*Motion to the Supreme Court of Puerto Rico Requesting  
Certificate that Federal Question was Raised*

record, we consider it more effective to request from this Honorable Court a Certification that Posadas timely raised the constitutional issue of:

- violation of the freedom of pure expression and/or commercial expression;
- violation of equal protection of the law by the establishment of a suspicious classification barring only the casinos from advertising games of chance, while other games of chance included under the Penal Code which were also legalized are allowed to advertise;
- violation of due process of Law due to the scope and ambiguity of the statute.

4. In order to at least leave this aspect of the jurisdictional phase we are burdened with, we are interested in including in the Joint Appendix which must be filed in the Supreme Court of the United States the certification of this Honorable Court. The Certification must include a detail of the three constitutional issues presented in the appeal.

WHEREFORE, we respectfully request from this Honorable Court that as soon as possible it issue the Certification requested herein to include same in the Joint Appendix of the Appeal to the Supreme Court of the United States.

In San Juan, Puerto Rico, November 18, 1985.

[Certificate of service omitted in printing.]

\*

**Resolution of November 27, 1985 of the Supreme Court of  
Puerto Rico.**

TRANSLATION

IN THE

SUPREME COURT OF PUERTO RICO

— ● —  
POSADAS DE P.R. ASSC. ETC.,

*Appellants,*

vs.

P. R. TOURISM COMPANY,

*Defendant-Appellee.*

Appeal from the Superior Court San Juan Section

Declaratory Judg.

No. 085-14

— ● —  
RESOLUTION

*Resolution of November 27, 1985 of the Supreme Court of  
Puerto Rico*

San Juan, Puerto Rico, November 27, 1985

Having examined appellant's motion, the same is authorized, prior the payment of the corresponding fees for translating to English the certified copies of the documents which are in the file of this Court and requested by Appellant.

Agreed to by the Court and certified by the Acting Secretary.

(sgd.)

**HERIBERTO PEREZ RUIZ**  
Acting Secretary

# **APPELLANT'S BRIEF**

FOR ARGUMENT

No. 84-1903

Supreme Court, U.S.  
F I L E D

DEC 12 1985

JOSEPH F. SPANOL, JR.  
CLERK

IN THE

# Supreme Court of the United States

October Term, 1985

POSADAS DE PUERTO RICO ASSOCIATES, d/b/a Condado Holiday Inn,  
*Appellant,*

**CORRECTED COPY**

THE TSM COMPANY OF PUERTO RICO,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

## BRIEF FOR THE APPELLANT

MARIA MILAGROS SOTO  
Banco Central Building  
Suite 815  
221 Ponce de Leon Avenue  
Hato Rey, PR 00917  
(809) 754-1920/1717  
*Counsel for Appellant*

### **The Questions Presented.**

1. Whether Section 8 of the Games of Chance Act of the Commonwealth of Puerto Rico, as amended, is repugnant to the Constitution of the United States if it:

a) violates the Free Speech Clause guaranteed by the First Amendment, and the protected commercial speech rights thereunder, by absolutely banning all casino advertising to the public in Puerto Rico;

b) violates the Equal Protection Clause guaranteed by the Fourteenth Amendment when the state totally bans casino advertising in any manner, although gaming is a legal business activity in Puerto Rico, while not imposing such restrictions on other games of chance—such as, horse races, cock fights and the lottery—without a valid overriding state interest that could justify unequal treatment and the infringement of First Amendment rights;

(c) violates the Due Process Clause embraced in the Fifth and Fourteenth Amendments due to the vagueness and overbreadth of the statute's no-advertising provision and its lack of definitions or reasonable standards for the interpretation of what constitutes "advertise or otherwise offer" a casino, or who is "the public of Puerto Rico" but prohibits all such conduct without time, place and manner speech restrictions nor reference to the truthfulness of the information provided.

2. Whether state action that completely suppresses dissemination of truthful information about entirely lawful activities requires a standard of strict judicial scrutiny under the United States Constitution and the United States Supreme Court precedents.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1985  
Case No. 84-1903

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POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a Condado Holiday Inn,  
*Appellant,*  
v.  
TOURISM COMPANY OF PUERTO RICO,  
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF  
PUERTO RICO

---

**Brief for the Appellant.**

Posadas de Puerto Rico Associates, Appellant, appeals from the final February 7, 1985 Resolution of the Supreme Court of Puerto Rico, dismissing for want of a substantial constitutional question the appeal of a final declaratory judgment of the San Juan Superior Court that upheld the facial constitutionality of Section 8 of Act 221 of May 15, 1948, as amended (15 L.P.R.A. Sec. 77). The decision of the San Juan Superior Court affirmed the validity of a statute of the Commonwealth of Puerto Rico that is repugnant to the Constitution of the United States.

**Opinions Below.**

Neither the Resolution of the Supreme Court of Puerto Rico, nor the final Declaratory Judgment and Opinion of

Honorable Guillermo Arbona Lago, San Juan Superior Court Judge, dated December 12, 1984, are reported.

They both were translated and included in the Appendix to the Jurisdictional Statement, Exhibits A and B thereof.<sup>1</sup>

### Jurisdiction.

This Honorable Court, on October 21, 1985, postponed further consideration of the question of jurisdiction until full hearing on the merits (JA 119a). Posadas will address briefly all relevant jurisdictional aspects under this heading even though some aspects are more fully developed under the "Argument" heading.

#### When Commonwealth's Statutes, Repugnant to the Constitution, Are Upheld, Review by Appeal Is Undertaken by the Court.

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by this Highest Court on appeal, where is drawn in question the validity of a statute of the Commonwealth on the ground of its being repugnant to the Constitution and the decision is in favor of its validity. U.S. Constitution, Art. III, Sec. 3; 28 U.S.C. Sec. 1258 (2). Finality, under 28 U.S.C. §1258(2) is determined when a decision precludes further adjudication in the Supreme Court of Puerto Rico. The denial of an appeal, on rehearing, for want of a substantial federal question, causes the decision of the state court to become final and appealable. *Chicago G.W.R. Co. v. Basham*, 249 U.S. 164 (1919); *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551-552 (1945); *Basic Economy Corp. v. Lugo*, C.A.

<sup>1</sup> Page 38b of the Declaratory Judgment has been reprinted to correct a printing error in the quotation of Section 1(7) of the Gaming Regulations, 15 R.R.P.R. Sec. 76a-1(7), as amended on May 22, 1971 (JA 112a).

Puerto Rico, 267 F.2d 263 (1959); *Teamsters v. El Imparcial, Inc.*, C.A. Puerto Rico, 300 F.2d 125 (1962).

The Declaratory Judgment of the Superior Court of San Juan, upheld the facial constitutionality of Section 8 of Act 221 (15 L.P.R.A. Sec. 77), without applying a strict scrutiny test, even though it absolutely bans all advertising to the "public" of Puerto Rico of the gaming facilities legalized in Puerto Rico since 1948, regardless of truthfulness. The text of the challenged Section 8 itself proves an overbroad, undefined, content-based, prior censorship abridging protected freedom of speech. Section 8 has abridged the protected freedom of "core" expression; and has been at all times relevant to this controversy, and continues to effectively be, an abridgment of constitutionally protected commercial speech.

If Congress is not allowed to make any law that abridges freedom of speech, the Legislature of Puerto Rico is so proscribed as well since the Commonwealth's present political status has been equated under 28 U.S.C. Sec. 1258 to that of a state for constitutional protection, duties and obligations. H. Rep. No. 683, 87th Cong., 1st Sess., p. 2 (1961).

Therefore, whether Act 221 is a state statute, *Calero-Toledo v. Pearson Yatch Leasing Co.*, 416 U.S. 663 (1974) or not, *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970), is irrelevant for the purpose of review under Sec. 1258 which codified the Balzac Rationale. *Palmore v. U.S.*, 411 U.S. 389 (1973). In *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), this Court held that the guaranties of certain fundamental rights declared in the Constitution, as are the deprivation of life, liberty or property without due process of law, had full application in Puerto Rico, even as a territory from the beginning of our relations with the federal government and Constitution.

The same conclusion was reached by this Court in *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976),

when it held that whether Puerto Rico is considered a territory or a state is of little consequence for purposes of the jurisdictional question of an appeal under 28 U.S.C. Sec. 1343 because each is included within Section 1983. While Puerto Rico occupies a unique relationship to the United States, Congress did not intend to leave the protection of federal rights to the local Puerto Rico courts when it entered into the Compact by which Puerto Rico assumed Commonwealth status. Similar relief, the Court concluded, could be obtained under similar provisions of the Constitution (*Id.* at 597-598).

Thus, although relief is appropriate through the civil libertarian deprivation of rights claim, Posadas chose to challenge the constitutional validity of Section 8 as repugnant to the Constitution of the United States to give the local courts the deference of interpreting the statute first in line with the local and federal constitutions. *Younger v. Harris*, 401 U.S. 37 (1971). If the State Court had held invalid the statutory provision on local constitutional grounds, it would have resolved the issue as a matter of local law. *Cablecom General, Inc. v. Crisp*, 699 F.2d 490, (1983). It held otherwise and opened the door for review.

Public Law 600, 64 Stat. 319, 48 U.S.C.A. Sections 731b-731e, which granted to Puerto Rico the right of self-government, required only that its constitution provide a republican form of government and include a bill of rights. As to the three applicable federal constitutional amendments at bar, the Commonwealth's constitution included similar provisions in its Bill of Rights, Art. II §§1, 4, 7. The Joint Resolution of Congress approving the constitution of the Commonwealth, subjects its government to the "applicable provisions of the Constitution of the United States, 66 Stat. 327 48 U.S.C. Sec. 731d".

The Declaratory Judgment at bar ignores the extension of First Amendment protection to commercial speech as interpreted by this Court, even though properly presented

and fully argued by Posadas at all levels of the case. In fact, the trial court failed to resolve the properly raised issue of total abridgment of the protected freedom of speech under local and federal law.

The two-prong invocation of First Amendment rights alone is sufficient ground for review by appeal under the United States cited statute. State action that completely suppresses dissemination of truthful information about entirely lawful activities does not present only a matter of local law, but a substantial federal question.

The Declaratory Judgment erroneously held that the classification made by the Commonwealth's Legislature of the casinos vis-a-vis other legalized gambling excepted from the Penal Code of 1937 (33 L.P.R.A. Sec. 299 *et seq.*) did not violate the constitutional equal protection clause. Although the Fourteenth Amendment challenge constitutes *per se* grounds for review by appeal, especially when the suspect classification abridges First Amendment rights and the statute's overbreadth steps on Fifth Amendment rights, the trial court failed to consider in our opinion, that allowing all other legal gambling activities to advertise while prohibiting the casinos from doing so, sweeps away any substantial government interest of discouraging the public of Puerto Rico to gamble, as asserted.

Such is the importance of this challenge.

Review by appeal should be undertaken by this High Court as the Supremacy Clause of the Constitution binds "the Judges in every state, . . . anything in the Constitution or Laws of any State to the contrary notwithstanding," in order to maintain the supreme law of the land within a single, uniform meaning which the judiciary is bound to respect and enforce. U.S. Constitution, Art. VI, cl 2; *Marbury v. Madison*, 1 Cranch 137 (1803); *Cohens v. Virginia*, 6 Wheat 264 (1821).

**The Time Factors Upon which Jurisdiction Rests Were Met.**

The Declaratory Judgment of the trial court sustaining that the cited Section 8, from its face, was constitutional, was docketed on December 14, 1984. Its appeal was due thirty days after, on January 13, 1985—a Sunday. On Monday, January 14, 1985, the Notice of Appeal was filed in the San Juan Superior Court, and an Informative Motion appending the Notice of Appeal was filed before the Supreme Court of Puerto Rico, all in conformity with the procedures and time limit of Puerto Rico's Civil Rules of Procedures of 1979 and the Regulations of the Supreme Court of Puerto Rico (R 263-321, JSA C [1] & [2]).

On February 7, 1985 the Supreme Court of Puerto Rico dismissed our petition both as an appeal and as a writ of certiorari, Justice Rebollo Lopez dissenting. The Court's resolution was notified on February 11, 1985. Rehearing, under Rule 45 of the Supreme Court Regulations, must be filed within ten working days from the date of notification. Our Motion of Reconsideration was filed within the time limit, on February 22, 1985, asserting that a total ban on free speech rights, which constitutes an absolute prior censorship of all advertising of a legal business, presents a substantial federal constitutional question (JSA D). Rehearing was denied on March 7, 1985, Justice Rebollo Lopez dissenting again. It was notified on March 11, 1985 (JSA E).

Notice of Appeal to the United States Supreme Court was filed on March 29, 1985 with the Clerks of the Supreme Court of Puerto Rico and the Superior Court of San Juan since the record had been sent to the Court below (JA 113-118a). The Honorable Supreme Court of Puerto Rico acknowledged the Notice of Appeal by Resolution of April 11, 1985, notified on April 15, 1985 (JSA G).

This appeal was docketed in this Court on June 4, 1985, within 90 days from the denial of rehearing below. The Brief for Appellant is timely filed.

**The Jurisdictional Requirement of Properly Raising the Federal Question in State Court Was Met at Every Stage of the Proceedings.**

At the earliest stage, the federal question was raised before the Tourism Company through a letter, dated February 24, 1982, which became Exhibit B of our Declaratory Judgment Complaint. (JSA H), *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Miller v. Cornwall R. Co.*, 168 U.S. 131 (1897); *White v. Johnson*, 282 U.S. 367 (1930). The federal claim and the grounds for each challenge were brought before the San Juan Superior Court in the Complaint with fair precision. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); *New York Central & H.R. Co. v. New York*, 186 U.S. 269 (1902). The pleadings of the Complaint (JSA I) raised that the gaming law provision and regulations at bar were unconstitutional because

- the total ban on casino advertising violated Plaintiff's constitutional rights protected by the First Amendment of the United States Constitution, and the Constitution of Puerto Rico,
- there was no overriding state interest substantial enough to infringe on Plaintiff's commercial free speech rights,
- the unlawful classification violated the United States Constitution Equal Protection Rights since other gambling activities are allowed by the State to advertise in Puerto Rico,
- due process guarantees were violated by retroactive application of a ruling, by the literal and overbroad interpretation that exceeded legislative intent, and

by an arbitrary, unreasonable, capricious application of the statute that yielded absurd results.

That the question was properly raised at the initial level is evidenced by Conclusion of Law No. 13 of the Declaratory Judgment and Opinion holding that the cited Amendments of the United States Constitution were applicable to the controversy.

The federal question was properly raised before the Supreme Court of Puerto Rico, both in the Appeal's *Constitutional Questions Raised* and in our Motion for Rehearing (JSA C[2], D). In the latter, we cite the leading cases of this Honorable Court that bind every jurisdiction where the United States flag flies. We then traced the Commonwealth's constitutional development in these areas and pointed out to the Court that Puerto Rico's development in the regulation of advertising by a state was in the stage of *Bigelow v. Virginia*, 421 U.S. 809 (1975), and had not reached the stage of *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), *et als*.

Notwithstanding proper presentation, the Court below erroneously rejected the federal question as unsubstantial.

Rehearing was denied.

Since the jurisdictional factor is significant where the highest court fails to pass upon the federal question raised, as is our case, we requested a Certificate (JA 120a) of the Commonwealth's Supreme Court to show that the omission of the Court below was not due to lack of proper presentation, *Street v. New York*, 394 U.S. 576 (1969); *Fuller v. Oregon*, 417 U.S. 40 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1972), and that a federal question was raised and decided. *Slage v. Ohio*, 366 U.S. 259 (1961). The Commonwealth's Supreme Court only issued a Resolution authorizing the Certification of translated

documents in the record. Inasmuch as the documents to show that the Question had been raised had been printed in the Jurisdictional Statement Appendix, we include the Resolution of November 27, 1985 (JA 123a).

Because this case was brought as an appeal to the Supreme Court of Puerto Rico, a summary dismissal of the appeal for want of a substantial federal question is a decision on the merits. *Hicks v. Miranda*, 420 U.S. 332, 344 (1975).

#### **There is A Justiciable Live Case or Controversy Before This Court.**

When Posadas filed its Complaint seeking declaratory relief, the four fines that originated the controversy had been paid, since otherwise, its casino license would not have been renewed.<sup>2</sup> Thus, Commonwealth's Orders were held moot (JSA B, 18b). However, there was an impending irreparable damage in the possible denial of a casino franchise for a sister operation in New Jersey on the basis that Posadas Commonwealth's record presented a continuous violation of the Gaming Act, for which reason said jurisdiction considered Posadas an unsuitable operator to be licensed (JA 68a). In addition, the ruling issued by Tourism had just been adopted with retroactive as well as prospective effects.

At that point, Posadas' main interest was the vindication of its reputation as a law-abiding citizen to avoid license denial by obtaining a declaration that the singled-out, continuing prohibition on all commercial speech about the casino facilities; and, the recurrence of government intrusion into fully protected pure speech, were two outright interferences with First Amendment rights. The issue was important enough to merit expensive litigation. The fines were not.

<sup>2</sup>Tourism incorrectly notified Posadas in 1979 that its Orders were final and unappealable enclosing copy of Section 9 of the Gaming Act (JSA B, 18b, Ja 7a).

Posadas was thereafter licensed in the State of New Jersey. But, Tourism's fines are capable of repetition, yet evading review, absent circumstances as the ones prevalent in this case. Posadas became aware, in a very costly way, that a petty trespass on its First Amendment rights could gain a momentous importance. This Court must be aware that being an exception to the Penal Code of Puerto Rico, Act 221 is penal in nature. Not only can Posadas be fined under the statute, or even lose its casino franchise, but also the violation of a regulation constitutes a misdemeanor subject to imprisonment as provided in its Article 9 (App. A, p. 1a). Appellee is still capable of sanctioning Posadas and it would be onerous to recommence a suit.

The "capable of repetition, yet evading review" doctrine is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. *Storer v. Brown*, 415 U.S. 724, 737 (1974) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1974); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911).

The allegedly "clear language of the statute to people of ordinary intelligence", contrary to the assertion by the Commonwealth had not been so clear to "ordinary" government officials, who trespassed the fine line distinction between core and commercial speech and imposed four fines not related to commercial transactions at all.

On the other hand, the absolute ban administrative Ruling is effective to this date. Although the Tourism Company followed the Trial Court's guidelines regarding the Dress Code held unconstitutional (JSA B, 35b) and amended its Gaming Regulations to incorporate similar

language as that suggested by the local Court (JSA B, 41b) this year (Rule 76a-4[e], 1985) (App. B, 1b), it did not follow the Court's guidelines regarding the Section 8 construction but has continued to apply its interpretation and ruling pending this appeal, concededly not firm.

Unlike the issue in *Princeton University et al. v. Schmid*, 455 U.S. 100, 103 (1982), the issue of the old regulation in this case is not moot. The underlying question persists. See *Carroll v. Princess Ann*, 393 U.S. 175, 179 (1968). The commercial speech prohibition of advertising through all publicity media to the public of Puerto Rico was left intact by the Trial Court's "interpretation" of the statute. This alone maintains the controversy very much alive. But under the Court's construction even an interference with free pure speech rights, is apt to recur, as long as the total ban is the regulating umbrella. For example:

#### *Hypothetical Number 1.*

*The Commonwealth amended its Gaming Regulation's Dress Code to allow the Casinos to determine the appropriate attire requirements. To show its approval of government action that eliminated the onerous practice of having to provide jackets to clients, Posadas invites the press to a symbolic ceremony, and the jackets are burned. The following day, a photo appears in one of the newspapers portraying the casino director and three supervisors burning the jackets outside the Casino door. The word "Casino" appears in the background. The message is simply: "In a symbolic ceremony, Posadas burns the jackets formerly required to be worn at a casino to celebrate the flexibilization of the dress requirements by recently approved regulations."*

*Tourism interprets the news coverage of this event as an advertisement addressed to the public of Puerto Rico*

simply because the word "Casino" appears in a photograph and in the caption.

Under the Trial Court's Guidelines is the conduct proscribed? Is it validly proscribed? Is it commercial speech? Is it core speech? Is Posadas case worse had it provided the photo to the newspaper?

### *Hypothetical Number 2.*

Posadas locks out its casino employees during a labor contract negotiation to pressure for the execution of a contract prior to the season. It continues to operate the casino with supervisors. The employees display picket signs saying: "CASINO IS CLOSED." Clients patronize other casinos believing the casino is closed. The National Labor Relations Board refuses to file for injunction in Federal Court. Posadas is losing money and losing its bargaining strategy. It decides to display a sign saying: "CASINO IS OPEN" under the free speech proviso of the National Labor Relations Act to negate the untruthfulness of the picket signs.

As soon as displayed, patrons return to Posadas and it recoups its bargaining position at the table until Tourism phones and orders that the sign be taken down because it is clearly advertising the casino to the public of Puerto Rico with the intent that the patrons return to gamble in its facilities. Therefore, it is offering its facilities to the public, which is a violation even under the new Guidelines.

Must Posadas obey the order and lose its bargaining position while the pickets continue to display the untrue information? Must it disobey it and risk a fine, license suspension or cancellation? Must it again return to Court to relitigate the issue?

The wrongful behavior can reasonably be expected to recur. *SEC v. Medical Committee for Human Rights*, 404

U.S. 403, 406 (1972). In the case of declaratory relief, this Court has held that the controversy is not moot. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Roe v. Wade*, 410 U.S. 113 (1973). If there is a reasonable expectation that the same complaining party may be subject to the same action again, review should be accorded. *Sosna v. Iowa*, 419 U.S. 393 (1974). Such is our case.

### **No Adequate State Grounds Bar Review.**

The only grounds before the Commonwealth court were the unconstitutionality under both local and federal law of Section 8 of Act 221, facially and as applied. That both grounds were considered in the final disposition arise from Conclusion of Law, paragraph 13, of the Declaratory Judgment that reads as follows:

"13. Sections 1, 4, 6, 7, and 20 of Article II, Bill of Rights of the Constitution of Puerto Rico, and the First, Fifth and Fourteenth Amendments of the Constitution of the United States are applicable to the controversy in this action."

When the trial court held unconstitutional the application of the statute on the basis of the Commonwealth Constitution, it validly did so on state grounds as the decision is in line with the federal precedents. (JSA B, 42b). But . . . when it disposed of the facial constitutionality attack of the statute under both constitutions, as already clearly established by the court, without specifying the grounds to support its determination, it reasonably follows that it also resolved the federal question adequately raised before it and which was considered applicable. *Hicks v. Miranda*, 422 U.S. 332 (1975).

This Court has jurisdiction to rescue the misapplication of the Constitution.

Obviously, the interpretation of the Bill of Rights of the Commonwealth's Constitution is not an independent and adequate nonfederal ground to validly bar review when it clashes with, and departs from federal constitutional law. *United Air Lines v. Mahin*, 410 U.S. 623, 630-631 (1973). But, even if the state court failed to pass upon the federal claim, the lack of jurisdiction is not conclusive. *Wood v. Chesborough*, 228 U.S. 672, 676-680 (1913). If no adequate nonfederal ground supports the state court judgment, the Court has jurisdiction. *Klinger v. Missouri*, 13 Wall. 257, 263 (1871). Otherwise, Supreme Court jurisdiction would be defeated by defendant raising some local ground and then suggesting that the trial court based its decision thereon.

In applying the standards adopted by this Court for determining the adequacy of the nonfederal grounds in *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1930), and *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 455 (1958), the nonfederal ground in this case is not adequate enough, without reference to the federal question, to sustain the judgment, and it certainly is not independent of it. *Murdock v. Memphis*, 20 Wall 590, 636 (1875); *Enterprise Irrig. Dist. v. Farmer Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 290 (1957); *United Air Lines v. Mahin*, 410 U.S. 623, 630-631 (1973).

We invoke this Court's jurisdiction to review the Commonwealth's decision at bar as a necessary means to declare and maintain uniform principles of constitutional law. *Martin v. Hunter's Lessee*, 1 Wheat 304 (1816).

The citizens of Puerto Rico are United States citizens, and are protected by the U. S. Constitution. The Commonwealth cannot, under section 2 of Chapter 145 of the Organic Act of March 2, 1917 still effective under the Compact, 64 Stat. 319, deprive United States citizens of any fundamental right without passing the strict scrutiny

of this Supreme Court. Such obligation arises under the Organic provision "as if Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of Section 2 Article VI of the Constitution."

**To Avoid Deciding the Constitutional Question the Trial Court  
Improperly Exercised Legislative and Executive Functions of  
Government.**

The federal question should not be reached by state courts if there are adequate grounds for decision. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936); *Cromwell v. Benson*, 285 U.S. 262 (1932). But, a state court should not avoid reaching the federal question by usurping policy-making and legislative functions to avoid review by this Court. *Heckler v. Matthews*, 52 LW 4333 (1984).

We are not suggesting that the Trial Judge exercised strict judicial restraint for this purpose. Posadas pays due respect to him at this point before this Honorable Court. We believe he left the question for our Supreme Court to decide, exercising at his level, a most conscientious analysis of the facts and the law in an effort to save its constitutionality, because he felt bound by the local case law cited in his opinion to defer the issue to the Commonwealth Supreme Court. *United Air Lines v. Mahin*, 410 U.S. 623 (1973).

It is apparent, we submit, that the Trial Judge really believed the statutory section was unconstitutional on its face. *Lowe v. S.E.C.*, 53 LW 4705, 4717 (1985). In his Opinion, the Trial Judge flashed a sign indicating the court's doubt as to the validity of the statute on its face (JSA B, 34b). In addition to his opening two paragraphs, the last Declaration of his Sentence reads:

"WE HEREBY DECLARE that section 8 of the law is not unconstitutional from its face and is sustained, *modified by the guidelines issued by this Court on this date . . .*" (emphasis supplied) (JSA B, 42b).

This declaration, Honorable Court, is an admission that the judicial was impermissibly legislating to avoid the constitutional question. Modification—not construction—is the key.

On point, is *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926), citing *Balzac v. Porto Rico*, 258 U.S. 298 (1922) and establishing that "The question of applying American constitutional limitations to a Philippine or Porto Rican statute dealing with the rights of persons living under the government established by the United States, *is not a local one*," as asserts the Commonwealth. Although Puerto Rico's status has changed since, the change has been one of constant growth into United States citizenship, rights and obligations, for which reason the case is still applicable to deny the Commonwealth's assertion that gaming is a local matter only.

In *Yu Cong Eng, supra*, this Court undertook to determine the meaning of a statute interpreted by the Philippine Islands Supreme Court. Delivering the opinion for the Court, Justice Taft held: "We can not give any other meaning to the Bookkeeping Act than that which its plain language imports, making it a crime for any one in the Philippine Islands engaged in business to keep his account books in Chinese. This brings us to the question whether the law *thus construed to mean what it says* is invalid."

We suggest this approach to this Court. Section 8 provides: "No gambling room shall be permitted to advertise or otherwise offer their (SIC) facilities to the public of Puerto Rico . . ."

It does not say what the trial court modified it to say.

The trial court did exactly what this Court said could not be done—substitute construction by amendment. A court may not exercise legislative functions to save the law from conflict with constitutional limitations. (*Ibid*, page 518). In *United States v. Reese*, 92 U.S. 214, Justice Waite held:

" . . . The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only . . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce the old one. This is no part of our duty."

Section 8 is not susceptible of any construction that, short of legislating, would make it constitutionally valid, and should be struck down, as will be argued. Because of the considerations given by this Court in *Yu Cong Eng*, at page 522-523 to distinguish the deference to construction by local courts in the case of states vis-a-vis territories where an independent judgment is exercised, this Court may look into the local court "interpretation" of Section 8 and determine if, as constructed, it withstands strict judicial scrutiny on the face of First Amendment rights.

The object of our argument here, however, is to move this Court to assume jurisdiction by appeal, even though aware that we have cited certiorari cases in some jurisdictional questions since no set of facts, nor questions of law are identical. It is on a case by case basis that we have developed a rich body of law. The extreme facts of our case, the fundamental questions involved, and the conflictive constitutional determination, support our petition that this Court grant our appeal.

### Constitutional Provisions, Law and Rules.

First, Fifth and Fourteenth Amendments, United States Constitution.

The Games of Chance Act of the Commonwealth of Puerto Rico, Act 221 of May 15, 1948, as amended.

Gaming Regulations, 15 R.R.P.R. Sec. 76-218

Gaming Regulations, 15 R.R.P.R. Sec. 76a-1(7), as amended on May 22, 1971

### Statement of the Case.\*

Posadas was a partnership organized under the laws of Texas and doing business in Puerto Rico as Condado Holiday Inn Hotel and Sands Casino since 1975 when it was granted a franchise to operate a games of chance parlor (JSA B, 26b, ff 1, 3). Tourism was created by Act No. 10 of June 18, 1970. The powers delegated to the Economic Development Administration under Act 221, *supra*, were transferred to the Tourism Company (ff 2).

Neither the Economic Development Administration nor Tourism supplied definitions of the scope of the prohibition on "advertising or offering the casinos to the public in Puerto Rico," or who was properly considered "the public," (JSA B, 31b, ff 5) nor if "in Puerto Rico" included the tourists once they arrived to the island (JSA B, 32b, ff 8). Neither agency provided guidelines to its officers for the interpretation of the law and regulations relative to the proscribed advertisements. Thus, from its inception, the lack of standards placed the administrative enforcement of the law and regulations in the total discretion of the directors of Tourism and its Gaming Department (ff 7). The only other notice to the concessionaire of its legal obligations was the inclusion of a condition in the

\*We shall rely on the trial court's statement of the case and findings of fact (ff).

franchise similar to, and as vague as, the statute (ff 8). Tourism enforced the law and regulations inconsistently throughout the years, allowing and proscribing similar conduct depending on the criteria of the officer in charge at the time (ff 9). The arbitrariness in the application of the law did not give real notice or assurance to Posadas of what was permissible or impermissible (ff 10).

On May 26, 1978 Posadas' Union, Asociacion de Empleados de Casino, published an advertisement congratulating Posadas for the opening of the former Hotel Flamboyen as the "Laguna Wing" in a Special Supplement of "The San Juan Star," dedicated to such an event (JA 22a). Posadas had no prior knowledge of, nor participation in, the publication of this ad (JA 29a). It was placed by the Union, paid with Union funds and was not "offering" the casino. In the Supplement, Mr. Ruben Causa's photograph was identified as "Casino Director" (JSA B, 15b).

By letter of June 1, 1978 the Gaming Director imposed a vicarious responsibility on Appellant warning Appellant's General Manager that this "ad" was a violation of the gaming law and regulations (JA 20a). Although the letter did not require a reply, on July 10, 1978, the first fine of \$500 was imposed on Appellant for not answering said letter (JSA B, 16b; JA 23a). With this second letter, the Gaming Director enclosed a copy of another letter addressed to him by Appellant's Casino Director, and indicated that the word "casino" had to be deleted from Appellant's letterhead because said use constituted an ad, citing his authority as final and unappealable under a paragraph of Article 9 of the law, which at the time had been repealed (JA 27a, App. A, 1a).

On July 13, 1978 Appellant denied advertising the casino, and questioned the Gaming Director's interpretation of an "ad," that Appellant could be held vicariously responsible for the Union conduct, and that an editorial

by the press or the word "casino" in a letterhead could be construed as ads under the law (JA 29a). Without awaiting for the determination of Appellee's Executive Director, the Gaming Director addressed a letter to Mr. Tom Monroe, President of Posadas de America Central S.A., on August 1, 1978 fining Posadas for advertising in the telephone book—a charge that was not only incorrect but that had never been notified to Posadas—and for the other charges beforementioned (JA 32a).

When on August 14, 1978 Posadas' General Manager was given notice of the second fine, he telephoned Tourism's Executive Director and both agreed that the fines would not be paid until an informal hearing took place. Said agreement was notified to the Gaming Director (JA 36a). In spite of this, the Gaming Director notified a third fine on September 1, 1978, because when Mr. Monroe answered his letter he used the letterhead with the word casino. He warned that it did not matter what use was made of the stationery, the casino reference had to be deleted and the fines paid before September 16, or the franchise would not be renewed (JA 37a). Posadas was notified through a copy of this letter three days prior to renewal of the franchise. On September 14, 1978, at Posadas's request, Tourism's Executive Director held the fines in abeyance until a ruling was issued (JSA B, 17b; JA 42a).

On February 16, 1979, the first ruling on advertising was issued by Tourism extending the total ban to:

"This prohibition includes the use of the word 'Casino' in match boxes, lighters, envelopes, stationery for internal or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, chinaware, lobbys, pennants, flyers, paperweights, pencils, telephone books, directories, bulletin boards, or in any dependency of the

hotel or object that may be accessible to the public in Puerto Rico."

This ruling was mailed to Posadas on March 12, 1979, retroactively applying the ruling to the "violations" beforestated and modifying the fines to \$1,000 plus imposing a new fine of \$500 (because a hotel guest had handed to a casino inspector a copy of a brochure placed in his guest room, that referred to the casino) and warning Posadas that this time it must pay the fines or the franchise would not be renewed on March 18, 1979. Because of the proximity of the renewal date, Appellant was forced to waive its due process rights (JSA B, 18b; JA 44a).

On July 31, 1981, Posadas' General Manager, who was also President of the Puerto Rico Hotel and Tourism Association, conducted a press conference to protest the elimination by state action of one third of the slot machines from the Island's casinos. As part of his protest to create consciousness of the consequences of said action on tourism and to promote legislation to paralyze this phase-out—a very controversial issue in Puerto Rico at the time—he conducted the reporters to the casino where he had designated the machines to be removed with a black ribbon and the message "R.I.P." The press photographed the General Manager with the slot machines and published an article on August 1, 1978 in "The San Juan Star," in which in his pure exercise of freedom of expression he criticized government action and informed the public of Puerto Rico on the ill-effects of the proposed removal (JA 56a).

As of said date, a new Gaming Director was in office, who on August 31, 1981 sent a letter to a superior officer of Posadas' General Manager informing the former that the latter had held a press conference and photographic session in violation of the gaming law and regulations, for which conduct a \$500 fine was being imposed (JA 55a).

This time the fine was paid with a non-waiver statement that Appellant's freedom of speech rights were being abridged and a challenge of lack of legal authority to prohibit the press from photographing or editorializing on an issue of public interest (JSA B, 19b; JA 60a).

The Trial Court found that, in addition to the fines, the New Jersey Gaming Commission considered denying a casino license to Appellant's sister operation, Greate Bay Hotel and Casino, because upon investigating Posadas, on January 11, 1982, it found petitioner "unsuitable" to qualify under said jurisdiction's laws on the basis that in its Puerto Rico operation it had continuously violated the gaming law and regulations (JSA B, 19b; JA 69a). This recommendation forced Posadas to appear at public hearings before the Commission at great cost and effort to justify the alleged negative record in Puerto Rico.

At this point, and because of the imminent extraordinary damage that Tourism's interpretation was causing, after exhausting administrative remedies, Posadas filed on March 12, 1982 its Complaint challenging the constitutionality of Section 8 of Act 221, *supra*, and the corresponding regulations, on all three grounds herein alleged, as well as the unconstitutionality of the application by Tourism of the law and regulations (JSA I).

On June 22, 1982, Tourism answered the Complaint essentially alleging that the prohibition was valid because it was in line with the legislative intent and that the free speech rights of Appellant were not absolute but can be restricted if related to a valid public interest. It further denied the equal protection challenge on grounds of similar treatment to all casino operators under Act 221 and the Commonwealth's right to establish this classification according to public policy, dissimilar from other forms of gambling. Finally, it asserted that applying the law as a total ban was valid because of the broad language of the law (JSA B, 5b; JA 9a).

On November 15, 1982 the Secretary of Justice of the Commonwealth intervened (JA 16a). Hearings took place on November 24 and 30, 1982. Memoranda of Law and Reply Briefs were submitted by December 31, 1982.

On December 12, 1984, Hon. Guillermo Arbona Lago, issued his Declaratory Judgment and Opinion. He held, that Tourism exceeded the legislative intent in its interpretation, had given an overbroad scope to the prohibition which produced absurd and unreasonable results (ff 12); had been arbitrary and capricious (ff 13); had lacked consistency, identification and continuity in its decisions (ff 14); had created intolerable unstability by its erratic administrative exercise of discretion (ff 15); had adopted overbroad interpretations that conflict with the legislative purpose of the Games of Chance Act (ff 16); and that the lack of guidelines and standards leave Posadas in a state of helplessness susceptible to recurrence (ff 18) for which reason the administrative interpretation and application has been unconstitutional (ff 19), and that it was indispensable that the regulatory deficiency be cured in order to save the statute's validity (ff 20).

In order to uphold the statute, the Trial Court erroneously held:

a) The classification made by the legislator of gaming in casinos versus other gambling is not suspicious or unreasonable; and, since there are no classifications within Act 221, the strict scrutiny criteria is not applicable.

b) The void for vagueness challenge under the due process clause can be overcome by the Court's provision of guidelines to direct the administrative officer's discretion, without it being necessary to strike down the validity of the statute.

Most important, the trial court abstained from resolving our First Amendment challenge, which is the core controversy presented here. The Trial Judge then adopted

substitute regulations on advertising for Tourism to follow after they have been duly publicized by the Secretary of State according to the Law and Regulations of Puerto Rico.

The Supreme Court of Puerto Rico ignored the trial court's recall of the exercise of its authority to strike down Section 8 and declined to hear the appeal for want of a substantial constitutional question.

### Summary of Argument.

Certain fundamental rights cannot be relinquished if our democratic system is to survive. The freedom of speech is a fundamental right protected by the Constitution. A state is forbidden to abridge First Amendment rights through the Fourteenth Amendment of the Constitution. When in the exercise of its constitutional powers an incidental restriction of speech is made, the statute or regulation must be subjected to the four part test adopted by this Court in *U.S. v. O'Brien*, 391 U.S. at 376-377 (1968). Under this test, the government must be acting within its constitutional power to further a substantial government interest that is unrelated to the suppression of free expression; and, in so doing, the incidental restriction may not be greater than necessary to the furtherance of the interest advanced. In evaluating pure speech restriction cases, when a facial attack upon the statute is present, the overbreadth and void-for vagueness doctrines apply.

Section 8 of the Gambling Act, which is the restrictive statute involved in this case, contains no standards that give adequate notice of the type of conduct prohibited, encouraging arbitrary enforcement, and subjecting the "offender" to penal sanctions, when sufficient definiteness—that ordinary people can understand—is totally lacking. *Kolender v. Lawson*, 455 U.S. 999 (1983). Posadas had understood the prohibition as encompassing commercial advertisements and had never advertised its casino.

However, Tourism gave an oversweeping interpretation to the provision that no reasonable, ordinary person could have foreseen. As a result, Posadas was sanctioned for allegedly violating the Gaming Law and Regulations as appears from the Statement of Facts. The absurd application of the statute speaks for its overly broad, undefined coverage. Thus, both the overbreadth and vagueness of the statute allow an interpretation that surpass the commercial speech limitation that the legislator may have intended. There is no legislative history or statement of motives on Section 8 while Section 1 expressly justifies the legalization and regulation of the casinos for three purposes: the promotion of tourism, the protection of the tourist, and the increase of the government's revenues. Section 8 is in conflict with Section 1. It is unrelated to the remaining seven sections of the law, and is separable without affecting the uncontested state power to strictly regulate gaming.

Should Section 8 have been subjected to the *O'Brien* Test, it would not have passed constitutional muster because it is not an incidental restriction of speech; *it is intended to suppress speech*. The interest advanced by government is both excessive and ineffective to advance the alleged substantial interest.

The statute is mainly invalid, however, because even under the less protected freedom of commercial speech test adopted by this Court in *Central Hudson Gas & Electric Co.*, 447 U.S. 557 (1980), it would run afoul of the Constitution. Commercial speech advertising is constitutionally protected as long as it is truthful, *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976). If an activity is illegal, the state may prohibit its advertising. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Resources*, 413 U.S. 376 (1973). If an activity is legal, the state cannot prohibit advertising it. *Bigelow v. Virginia*, 421 U.S. 809 (1975). The argument that advertis-

ing techniques work on the subconscious to make people do what they do not want to do has been rejected by this court as have been prophylactic rules that are speculative and unsupported by factual basis. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 53 L.W. 4587 (1985). Section 8 is a prophylactic rule that suppresses truthful information about a legal activity; and therefore, must be subjected to the strict judicial scrutiny form of review. Considering the government interest involved as arises from the law against the interest inferred by the Commonwealth, the statutory provision is facially unconstitutional as it neither advances a substantial government interest, nor is the least restrictive means to serve that interest. The classification of gaming for speech limitation purposes, when other forms of legal gambling are allowed to advertise in Puerto Rico both constitutes a violation of the substantive rights under the Equal Protection clause and serve to undermine the substantiality asserted by the Commonwealth of a cogent state interest. The Commonwealth may not impose on a casino franchise holder conditions that are repugnant to the Constitution.

### Argument.

This case presents the substantial question whether a statute of the Commonwealth of Puerto Rico violates the First, Fifth, and Fourteenth Amendments of the Constitution because it completely bans a casino franchise holder from advertising or offering its casino facilities to the public of Puerto Rico.

A reading of the controverted provision reasonably places it as a commercial speech prohibition even if it extends beyond advertising and bans the "offering of its facilities" also. The facts, the documentary evidence submitted at the trial hearing, (JA 19a-100a), the record as a whole, demonstrate that historically the provision has

been enforced by Tourism as its face dictates—a total suppression of all information on the subject of casinos, regardless of its use, and of truthfulness, as if gaming were an illegal business. The overbreadth and lack of definition of the ban has blurred the fine line—distinction between the intended commercial speech restriction and "core" speech suppression.

For argument's sake, we invert the questions presented in this case and will argue the narrow question of an invalid classification of First Amendment rights with an intent of totally suppressing truthful commercial information to the public in Puerto Rico; and then move on to the invalid restriction of pure speech and due process claims.

### (I)

**The Central Hudson Test Should be Applied by This Court to State Action That Completely Suppresses Dissemination of Truthful Information About Entirely Lawful Activities.**

In *Zauderer v. Office of Disciplinary Counsel of The Supreme Court of Ohio*, 53 LW 4587 (1985), the general approach to restrictions on commercial speech was summarized for us by the Court while expressing that the precise bounds of the category of commercial expression remain more subject to doubt. Perhaps the extreme facts of our case may help frame what is commercial speech, and what is not; if not by definition, by illustration. Posadas asserts that none of the actions punished by Tourism can be considered commercial speech. On the other hand, since the prior censorship of the statute of all information on a legitimate business is present, Posadas proposes that the Court subject Section 8 to the four-prong test adopted in *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980).

Because freedom of speech is an essential part of our

form of government, it should enjoy the presumption that it is permissible. The burden of proving a basis for suppression should fall on the state. Judging by the precedents handed down by this Court during the last ten years, it seems that the Court may very well be ready for carefully crafting a mandatory-for-lower-courts principle in line with its dicta in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that the Constitution has made the choice between the dangers of suppressing information and the dangers of its misuse if it is freely available. The uncharted area that justified the caution exercised in *Friedman v. Rogers*, 440 U.S. 1 (1979) has been carefully charted, as summarized and broadened in *Zauderer, supra*. It is by now well settled that:

The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. *Friedman, supra*.

—Information that proposes an illegal transaction may be suppressed validly. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973).

—Commercial speech that is not false or deceptive and does not concern unlawful activities, may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest. *Central Hudson, supra*.

These are the basic premises of the protection accorded commercial speech. We do not need to look further. But, because there have been refinement and exceptions to the doctrine through abundant case law, the following decisions are pertinent:

1. Blanket bans on price advertising by professionals are impermissible. *Virginia, supra*; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
2. Rules preventing attorneys from using nondeceptive

terminology to describe their fields of practice are invalid. *Bates, supra*; *In re R.M.J.*, 455 U.S. 191 (1982).

3. In-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal service. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).
4. Commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech; restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. *Zauderer, supra*.
5. The mere fact that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. *Carey v. Population Services International*, 431 U.S. 678, 701 (1977).
6. Prophylactic rules may not be lightly justified if the protections afforded commercial speech are to retain their force. *Zauderer, supra*.
7. First Amendment protection to commercial speech is justified by the value to consumers of the information such speech provides. *Virginia, supra*.

Since *Virginia State Board, supra*, this Court has struck down all *absolute* bans on commercial speech that interfere with the free flow of information that consumers have a right to receive. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *In re Primus*, 436 U.S. 412 (1978); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983). No true deviation from the charted course would bar the adoption of a firm principle that the strict scrutiny test best serves the constitutional balance of state versus individual rights because

the statutes that have been held valid were either time, place and manner restrictions, content-neutral, regulated illegal activity or were partial bans. *Clark v. Community for Creative Non-Violence*, 52 L.W. 4986 (1984); *Century 21 Real Estate Corp. v. Nevada Real Estate Advisory Comm'n*, aff'd 440 U.S. 941 (1979); *City Council Taxpayers v. Vincent*, 104 S.Ct. 2118 (1984); *Village of Hoffman's Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982); *D&B v. Greenmoss Builders, Inc.*, 53 L.W. 4866 (1985).

Strict scrutiny is the standard of review in cases where a broad or blanket state ban impermissibly abridges the free flow of truthful information about a legal activity.

**Gaming Is a Legal Activity in the Commonwealth of Puerto Rico Deserving Commercial Speech Protection.**

From the outset, we must set down the basic premise that gaming is a legal business in Puerto Rico since casinos were legalized back in 1948. Furthermore, it is a legal business more strictly regulated than other legal businesses, including banking. The public that patronize casinos are better protected than when they patronize other businesses. Yet, casinos continue to face an image problem. The early origins of unregulated casinos in other jurisdictions, giving way to organized crime involvement, continue to haunt and penalize the specialized professionals who under strict government scrutiny now run the industry in Puerto Rico. However, this image problem cannot taint First Amendment rights.

To place the legalization of the games of chance in the right perspective, it should be stressed that gaming was approved by the legislators, after weighing the "social evils" tantamount to it, for a worthy purpose—that of promoting tourism. The purpose was considered important enough to be made an integral part of the law in Section 1,

as cited by the Commonwealth (MTD, p. 4).

It is also important to point out the historic moment in time when the Act was adopted. A social evolution had begun in 1942 to make Puerto Rico the showcase of the Caribbean. The Government had launched its industrialization program to pull an impoverished agricultural economy up by its bootstraps ("Operation Bootstrap").<sup>3</sup> The agency in charge of this program was the Economic Development Administration—the same agency to which the tourism and gambling development program was delegated in '48.

As Section 1 clearly represents, gaming was the necessary tool to develop the infrastructure needed to place Puerto Rico on a par with the great tourist centers of the world. Hotel rooms were needed not only for the tourism plan but to house the industrialists interested in the local tax exemption program, low labor and utility costs, and other incentives of the industrial program. To lure investment, for a good cause, the advantages of gaming outweighed the disadvantages of its legalization. The decision to exempt the games of chance from the Penal Code of Puerto Rico, and make them legal was made back then.

Now, most of the states ban gambling altogether, a policy which may not be questioned. Two other states under the United States flag, however, have chosen to legalize casinos for economic or urban renewal purposes. All the three states invited investment by legalization.

The strict regulation cited by the Commonwealth (MTD 8) as enunciated by the Commonwealth's Supreme Court in *United Hotels of P.R. v. Willig*, 89 P.R.R. 185 (1963), in exchange for the license to do business in Puerto Rico is within the police power of the Commonwealth. Local government control has maintained Puerto Rico free from

<sup>3</sup>Raymond Carr; *Puerto Rico: A Colonial Experiment*, 1984, (N.Y. University Press, New York & London), pp. 1-412.

gaming scandals and organized crime infiltration.<sup>4</sup> We must agree with the Commonwealth that the regulating of *how gaming is to be conducted* to promote tourism, protect the tourist, and increase government revenues, is indeed a matter of pure local law.

In *Willig*, however, the Supreme Court of Puerto Rico held that gaming debts, which by Civil Code provisions were uncollectable, may be collected as Act 221, by legalizing casinos, implicitly amended the Civil Code; and in so doing the Court held:

"Furthermore, it is not possible to impute to the Government of Puerto Rico the untenable position that, while in the one hand, it requires certain persons, as a condition for the granting of a game license, to invest not less than \$5,000,000 or its equivalent in the construction of a hotel of not less than 300 rooms, the maintenance of a tourism hotel within the most strict norms of the branch, while it charges \$24,000 annually for such license, while it requires them to pay in cash to the players who win in the casino, and while it authorizes them expressly by regulation having the force of law to extend credit to the bettors, on the other hand that whenever these persons who have complied with these conditions and paid those moneys find it necessary to resort to the State, through the judicial branch, in order to assert *their rights created by law*, The State should then assume the position that those persons have no remedy at law."

The Court's reasoning as interpreted from the above is that once legalized the hotel-casino must be allowed to do business as a legal business, a reasoning adopted by the trial court also (JSA B, 32b). We must object at this point

<sup>4</sup>*Gaming In America*, Commission On the Review of the National Policy Towards Gambling, 1976 (Casino Gambling in Puerto Rico, pp. 99-100, App. C, 1c).

to the Commonwealth's manipulation of the *Willig* case, as well as of *Irizarry v. Villanueva*, 70 P.R.R. 71 (1940); and *Serra v. Salesian Society*, 84 P.R.R. (1961). To state (MTD 8) that these cases uphold the public policy framing the Games of Chance Act as elaborated in the previous page—that "it is the public policy of the Government of Puerto Rico to discourage games of chance and to stimulate the attitude of the individuals to obtain income based on their efforts and work" (JA 14a) is a gross misrepresentation to this Court.

First of all, the *Irizarry* case is a 1940 case dealing with the pre-legalization of games of chance, and should not be used for framing the public policy of a statute adopted eight years later.

Second, *Serra v. Salesian Society*, *supra*, dealt with an illegal raffle and the enforcement of an illegal contract and did not deal with the public policy of Act 221.

Thirdly, *Willig*, *supra*, was decided in 1961, prior to the amendments to Act 221 by Act No. 2 of July 30, 1974; Act No. 13 of June 26, 1980 and Act No. 1 of July 30, 1982; all three dealing with the legalization of slot machines as an economic aid to hotels—not for the promotion of tourism. The public policy when *Willig* was decided was Section 1, as amended in 1956, to read:

"Section 1.—Statement of Motives.—The purpose of this act is to contribute toward the development of tourism by authorizing certain games of chance customary in recreation resorts in famous tourist centers throughout the world, and by the government's regulating and exercising strict surveillance over said games with a view to ensure tourists all possible safeguards and at the same time affording the Secretary of the Treasury of Puerto Rico an additional source of revenue."

There was ample evidence on the record to establish that the cited policy of discouraging gaming was really not

framed by the Legislature but by the Honorable Governor of Puerto Rico. The Trial Judge's findings to that effect are an easier reference to the Court than an expedition through the record and we thus refer to pages 22b-23b (JSA B) to convey the history of the slot machines ordeal, which reflects that after two Executive vetoes, the Governor's conditions had to be accepted by the Legislature in order to postpone their phase-out. It is relevant to inform this Court, since the Commonwealth failed to do so, that on July 2, 1984 (after we had filed our Appeal, but before it filed its Motion to Dismiss) the Legislature extended indefinitely the slot machine operation when a new administration came into power. Act No. 46 has no statement of motives that gaming should be discouraged, and since it allows for the substitution of the obsolete equipment by new slot machines and by machines of certainly higher denomination, a presumption that it favors said operation arises.

To conclude, gaming is legal. It serves public policy well.

Although the regulation of gaming is a local matter, the regulation of speech about gaming is a matter of federal law deserving constitutional protection. A gag on all speech related to casinos, be it commercial or non-commercial, violates a fundamentally protected constitutional right. *Bolger v. Young Drug Product Corp.*, 463 U.S. 60 (1983); *F.C.C. v. League of Women Voters of California*, 52 L.W. 5008 (1984).

**The Commonwealth May Not Impose on a License Holder Conditions that Are Repugnant to the Constitution.**

The power of a state to require a license for the privilege of conducting a gaming business is unquestioned here. But, the acceptance of such license cannot impose on the franchise holder an obligation to comply with any provision of a statute that is repugnant to the Constitution and

the Laws of the United States. *W. W. Cargill Co. v. Minnesota*, 180 U.S. 452 (1901). This Court has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "privilege" or as "right." *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Morrisey v. Brewer*, 408 U.S. 471 (1972).

The state's power to deny a privilege altogether does not include authority to impose conditions when granting a license which require the relinquishment of constitutional rights. *Insurance Company v. Morse*, 20 Wall. 445, 456. In *Barron v. Burnside*, 121 U.S. 186, 197 (1887), this limitation was reaffirmed:

"... In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States. *La Fayette Ins. Co. v. French*, 18 How. 404, 407; *Ducat v. Chicago*, 10 Wall 410, 415; *Ins. Co., v. Morse*, 20 Wall. 445, 456; *St. Clair v. Cox*, 106 U.S. 350, 356; *Phila. Fire Assn. v. New York*, 119 U.S. 110, 120."

It is a well settled principle that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. *Frost Trucking Co. v. R. R. Com.*, 271 U.S. 583 (1925). A constitutional power by the state cannot be used by way of condition to attain an unconstitutional result. The Court there emphasized that "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The protection granted to foreign corporations, under

Commerce clause cases, cannot be greater than that afforded to domestic corporations, partnerships, associations, unions or United States citizens. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). See *Western & Southern L.I. Co. v. Bd. of Education*, 451 U.S. 648 (1980). And, the reasoning is applicable to other constitutional rights as well, be they First, Fifth, or Fourteenth Amendment rights. See *Examining Board of Flores de Otero*, 426 U.S. 572 (1976).

This Court has sustained the right to exercise constitutional rights by the recipients of tax exemption, (*Speiser v. Randall*, 357 U.S. 513 [1958]), unemployment benefits (*Sherbert v. Verner*, 374 U.S. 398 [1963]), public employment (*Slochower v. Board of Education*, 350 U.S. 551 [1956]), or a home in a public housing project, (*U. S. v. Chicago, M. St.P. & P.R. Co.*, 282 U.S. 311, 328 [1931]); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The Commonwealth, however, is relying on unapplicable basis, citing authorities that do not apply in this case (MTD 18). Of course, a licensing state can regulate and control the activity it authorizes. Page 37. But, if it chooses to absolutely ban speech, it must withstand strict judicial scrutiny. We believe that the jurisprudence cited at page 19 of the Commonwealth's Motion does not apply to our case because the Constitution has not specifically granted to the states, as in the case of liquor, the regulation of gaming.

In *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, (1981) this Court recognized the absolute power of the states to prohibit totally the sale of liquor under the Twenty First Amendment of the United States, citing *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), and to regulate the times, means and manner under which it can be sold. *California v. LaRue*, 409 U.S. 109 (1972). The ban in *Bellanca*, however, was not a total ban. The topless nude dancing ban passed constitutional muster because it

was only prohibited in establishments licensed to serve liquor on the basis of the reasonable disturbances associated with mixing alcohol and nude dancing, and because of the added presumption in favor of the validity of the state regulation conferred by the Twenty First Amendment.

In *Oklahoma Telecasters Association v. Crisp*, 699 F 2d 490 (1983) the Tenth Circuit applied the strict scrutiny test but felt compelled by *Queensgate Investment Co. v. Liquor Control Commission*, 103 S.Ct. 31 (1982) dismissing the appeal from an Ohio Supreme Court that sustained a state regulation that prohibited retail liquor permit holders from advertising the retail price of alcoholic beverages. The ban in the latter case was only on retail prices advertising.

In the *Oklahoma Telecasters* case, although, the ban was more extensive than the *Queensgate* restriction it was not an absolute prohibition either. Even after analyzing the "added presumption" of the Twenty First Amendment, the Circuit Court cited *Craig v. Boren*, 429 U.S. 190 (1976) and *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) stare decisis that the Twenty First Amendment did not give states authority to abrogate individual rights guaranteed by the Fourteenth Amendment and other provisions of the Constitution. It then upheld the validity of the ban because "Oklahoma has not eliminated the dissemination of information concerning alcoholic beverages" as even if the Appellee are prohibited from rebroadcasting alcoholic beverage advertising they are free to carry other forms of advertising. With reference to the balancing test, the Court held that the Twenty First Amendment shifts the balance in favor of the state.

The Commonwealth also cites *Dunagin v. City of Oxford, Miss.* 718 F 2d 738 (1983) upholding an in-state advertising ban, cert. denied, 104 S. Ct. 3553 (1984). But it is questionable how much of *Dunagin* survives after

*Capital Cities Cable v. Crisp*, 104 S. Ct. 2694 (June 18, 1984). Although the latter was resolved under the preemption doctrine, the Court reaffirms the principle that the Twenty First Amendment does not license the states to ignore their obligations under other provisions of the Constitution; and most important, it in fact held that in spite of the broad powers of the Amendment, the Federal Government retains authority under the Commerce Clause to regulate even interstate commerce in liquor. We read the decision to infer that even on the face of an express constitutional provision granting states absolute control over liquor, the state power is not unlimited. Even when it was not necessary to reach the First Amendment question, the Court reasoned that the ban was not absolute as it allowed both print and broadcast commercials for beer, as well as advertisements for all alcoholic beverages in newspapers, magazines and other publications printed outside of the states.

The issues should not be confused. First, we are not before a state power of constitutional rank as that conveyed by the Twenty-first Amendment. Second, we are before an absolute ban on protected speech.

Therefore, the normal licensing power of the state is at stake and not a presumptive authority to tilt the balance. The line of cases, more closely related are those dealing with the important licensing function of the law profession and this Court has found the state's interest to maintain the standard of the legal profession insufficient to override society's interest in assuring the free flow of commercial information. *Bates*, 433 U.S. at 384. The principle that government may restrict the entry into professions through licensing does not encompass the licensing of speech. *Thomas v. Collins*, 323 U.S. 516 (1945); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

In point also is *Consolidated Edison Co. v. Public Serv.*

*Comm'n*, 447 U.S. 530 (1980) where in a footnote the Court stated that Consolidated Edison's status as a government regulated monopoly does not preclude its assertion of First Amendment rights as speech of heavily regulated business enjoys constitutional protection.

**The Commonwealth Has No Substantial Interest in the Total Suppression of Licensed Casino Advertising.**

The Government interest to promote tourism is substantial.

Section 8 does not advance the government interest to promote tourism.<sup>5</sup> Therefore, Section 8 is not substantial.

We call the Court's attention to the last paragraph of page 23b (JSA B) on the negative effect of the ban on potential tourism development, as supported by statistics before the Trial Court. It follows that the ban conflicts with public policy. This short exercise should dispose of the rest of the test. However, should the Court find the opposite, we apply the third step of *Central Hudson*.

**The Ban Does Not Advance the Commonwealth Interest Asserted in the Pleadings and in the Argument Before This Court.**

The interest that Section 8 protects is highly speculative. The legislator did not express why he banned advertising.

We could infer what the Trial Court inferred from the letter of the law, namely, that it was to protect the Puerto Rican (JSA B, 32b).<sup>6</sup> Yet, this is not the interest advanced by the Commonwealth. We have already discussed the pleadings, and the reasons advanced by Tourism before the Trial Court. We now direct the Court's attention to the only reason advanced at page 5 (MTD), paragraph 5. Tourism

<sup>5</sup> See findings 12, 16, 17 (JSA B, 28-29b) and the Trial Court's analysis at pp. 21b, 23b, 24b.

<sup>6</sup> But this construction is constitutionally defective also Puerto Rico is not empowered to create a classification of United States citizens allowing the "social evils" of gaming to haunt mainland citizens while protecting those at home.

has been depriving Posadas from its First Amendment rights in order to:

1. Guarantee the security of the tourist so that he is not damaged by the uncontrolled patronage of persons (Puerto Ricans?) extraneous to the casino interests attracted by publicity.<sup>7</sup>
2. Discourage the games of chance and authorize them only as a means to promote tourism. Since the public of Puerto Rico does not contribute to the development of tourism because they are not tourists, nor do they provide additional source of income since the source of the income of the people of Puerto Rico is Puerto Rico itself, the Legislature prohibited advertising.

We affirm that the Commonwealth's interest is at most tenuous. We have established that it is not possible that as claimed by Tourism in 1948 the legislative intent for legalizing gaming were to discourage the games of chance. This purpose did not arise until 1980, and then only with relation to slot machines—not casinos (JSA B, 31b, #7). Said intent was an imposition of the Executive over the Legislative Branch. The proof is that slots were extended indefinitely by the new administration.

The Commonwealth, however, would have First Amendment rights violated on the thin excuse that Puerto Ricans do not contribute to the revenues. Were this true, *arguendo*, such inconsequential interest could not prevail over free speech abridgement.

**A Total Ban on Truthful Information on a Legitimate Business Is More Extensive Than Necessary to Serve the Commonwealth's Tenuous Interest.**

<sup>7</sup> This intent was apparently abandoned by the Commonwealth for which reason we will not dwell on it, reserving a reply should it choose to develop the theory in its Brief.

Freedom of speech, guaranteed by the First Amendment, is secured to all persons by the Fourteenth Amendment against abridgement by the States. *Thornhill v. Alabama*, 310 U.S. 88 (1940). It is generally needless to analyze laws which burden the exercise of First Amendment rights by a class under the Equal Protection clause, because the substantive guarantees of the amendment serve as the strongest protection against the limitation of these rights. The First Amendment rights and, therefore, the classifications of the ability to exercise those rights are subject to strict judicial scrutiny.<sup>8</sup>

In our case, we bring a two-fold equal protection claim: as a classification of repression of speech and as a classification of a form of legalized gaming previously criminally codified. The second challenge, by itself, may have required the traditional rational test only. Combined with speech suppression, the classification had to be subjected to strict scrutiny. Its discussion under this heading will aid to prove that the means adopted to discourage gambling are both over-inclusive and under-inclusive to be an effective means of advancing the alleged government interests. By taxing casinos totally, the ban is more extensive than necessary over this particular class of business while if the Commonwealth proposed to control gambling by Puerto Ricans as a social evil, it should have adopted a consistent public policy that would advance such interest. The facts deny the legitimacy of gagging one classification of gaming while allowing uncontrolled advertising by all other forms of legalized gambling. We quote the trial court's third Conclusion of Law (JSA B, 30b):

"3. Gambling was proscribed in the Penal Code of 1937, Art. 299, *et seq.* Gradually games were legalized in Puerto Rico, including betting games ("picas") at patron day festivals, bingos for chari-

<sup>8</sup> *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Bolger V. Youngs Drug Products Corp.*, 463 U.S. 60, 4964 (1983).

table purposes and in the casinos, state lottery, cock-fights, horse racing, the municipal lottery, dice, roulette, cards and slot machines. There is only one prohibition remaining from that Penal Code, the numbers game."

Ample evidence of advertisements in these other classifications was introduced at the hearing and post-hearing (JA 102a, 103a, 104a, R228-230). The Trial Court took judicial cognizance of the following:

"We were supplied with written texts and recordings of the various advertisements of the Lottery of Puerto Rico. We were requested to take judicial notice that the horse races are not only announced, but transmitted on race days, and that the cockfighting law does not impose any limitation on advertising. We did so" (JSA B, 24b).

If the discouragement of gambling were a cogent state interest to justify prohibiting the advertising of casinos, how can the state-operated lottery be allowed to advertise to the public in Puerto Rico, as the record shows? Why can cock fights and horseraces—more highly patronized by Puerto Ricans than casinos—be allowed to advertise? The excepted classifications (other than casinos) of legalized gambling are allowed to advertise. Casinos are silenced without any Statement of Motive for the dissimilar treatment within the Act at bar that would enlighten the need for the proscription or the legitimate interest it will advance.

Act 221 does not establish suspect classifications within its body of law. It is itself a classification of legalized gambling in its totality as an exception to the general proscription of the Penal Code that encompassed all forms of gambling.<sup>9</sup> Thence, its penal characteristics and criminal sanctions

<sup>9</sup> It is pertinent to strengthen our substantive Fourteenth Amendment claim to point out that the Gambling Federal Devices Act, P.L. 87-840, October 18, 1962, Sec. 1955, defines: "Gambling includes, but is not limited too, pool-selling, book-making, maintaining slot machines, roulette wheels, or dice tables, conducting lotteries, policy, 'bolita,' or number games or selling chances therein."

as felonies or misdemeanors, depending on the pertinent conduct involved. The games of chance conducted at the casinos are part of the wider category of "gambling." Yet, the Trial Court erroneously held that the classification made was not suspect and explained his reasoning as follows:

"... Since cockfighting, horse racing, small betting games ("picas") and the lottery have been traditionally part of the Puerto Rican's roots, the legislator could have been more flexible than in authorizing more sophisticated games which are not so widely sponsored by the people. Therefore, since Law 221 itself does not establish classifications and equal treatment is given to the holders of franchises, and what is questioned here is the dissimilarity of the conditions to legalize the games of chance banned by the Penal Code of 1937, we conclude that it is not necessary to adopt the criteria of strict scrutiny..." (JSA B, 35b).<sup>10</sup>

The Trial Court used the legislative deference rule of review stated in *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) not giving weight to the exception expressed when a classification trammels fundamental rights. *Friedman v. Rogers*, 440 U.S. 1 (1979). It rejected our argument that on the face of a First Amendment limitation of rights, a suspect classification of "speech" required the *Central Hudson* balancing test. It erred.<sup>11</sup>

It is not only Posadas rights that are at stake in this case. The public in Puerto Rico, including the tourist who visits us, has protected rights to receive truthful information on gaming procedures, betting limits, gaming hours, regula-

<sup>10</sup> Illegal casinos are part of the "Puerto Rican roots". App. C 99c.

<sup>11</sup> *Gitlow v. New York*, 268 U.S. 652 (1925); *Near v. Minnesota*, 283 U.S. 697, 701 (1931); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 465, 500 (1952); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980).

tory changes, special promotions and activities, etc., just as it has a right to receive information on which movies are showing, when and where. *Virginia, supra*; *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977); *Procunier v. Martinez*, 416 U.S. 396 (1974). Interestingly, the Commonwealth raises for the first time before this Court an argument never raised before: (MTD 16)

“... It is known that the advertising business is very advanced with scientific techniques aimed to obtain proposed specific conduct from the people. Psychology is used as part of the advertising business in order to stimulate the individuals to do what the advertising aims to promote.”

Such prophylactic rules have been precisely rejected by this Honorable Court as unsupported assertions. *Zauderer, supra*. Tourism has never conducted a study of the social impact of gaming in Puerto Rico (JSA B, 22b). As in *Zauderer*, the state would like to convince the Court of potential abuses associated with the use of illustrations, or advertising. This Court has refused to submit to censorship, not what it is said, but what the state thinks *might* be said that *could* be deceiving. On the thin basis of this hypothesis, can the Commonwealth argue that the ban of intended speech is no broader than necessary?

We argue that if gambling is not considered an evil so serious as to discourage the advertising of highly-patronized-by-Puerto-Ricans forms of gambling, a blanket ban of information on an activity patronized by only 5% of the public in Puerto Rico is, at best, a tenuous interest that could never override our freedoms. Although the Commonwealth refers to the public and the people of Puerto Rico as synonyms, the term public is broader and impermissibly includes, as the record shows, the tourist who may be sojourning in hotels without casinos, condohotels, guesthouses, or private homes as visitors. The ban could not be considered the

least restrictive means as it fails to advance the reason for having legalized such games—tourism.

Tourism's goals can be served best by less intrusive measures than an absolute prohibition of information.<sup>12</sup> Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980). As is, the statute is overbroad, in addition to failing the acid test of *Central Hudson*.

## (II)

### **Section 8 of Act 221 Violates the Due Process Clause Embodied in the Fifth and Fourteenth Amendments of the Constitution Under the Overbreadth and Void-for-Vagueness Doctrines**

The fatal flaw in Section 8 is that it is so overly broad and vague as to restrict valid speech interests that transcend protected commercial speech rights, as was dramatically evidenced by the penal fine imposed on Posadas for publicly debating an issue of general public concern.<sup>13</sup>

This appeal also represents a facial challenge because the statute contains no standards that give fair and adequate notice of the type of conduct prohibited, encouraging arbitrary enforcement, and subjecting the “offender” to penal sanctions when sufficient definiteness—that ordinary people can understand—is totally lacking. *Kolender v. Lawson*, 455 U.S. 999 (1983); *Village of Hoffman Estates v. Flip-*

<sup>12</sup> The Gaming Act, for example, already contains direct proscriptions. Section 9, making it unlawful for any person to introduce in the casinos gambling devices, and to violate the regulations; and providing for criminal sanctions.

<sup>13</sup> *N.A.A.C.P. v. Clairborne Hardware Co.*, 458 U.S. 886 (1982); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (defining public issues as those about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.)

side, *Hoffman Estates*, 455 U.S. 489 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

**An Absolute Ban On a Particular Class of Speech Will Be Upheld Only If Narrowly Drawn to Accomplish a Cogent State Interest<sup>14</sup>**

Section 8 prohibits information on casinos *in any manner*.

The term "Anuncios" in the Spanish language is more inclusive than "Advertising" in the English language. Unless defined, it could simply mean "to make known". "Anunciarse" in the Spanish text of the law is not defined. The term is both vague and overbroad.

When certain groups of persons are classified for specified government benefits or burdens, the Court will employ the strict scrutiny test under both the due process and equal protection guarantees, especially when a fundamental right is at stake. The challenge is that the oversweeping effects of an overbroad prohibition that impacts First Amendment freedoms—not incidentally, but totally—cannot be justified under the *O'Brien*<sup>15</sup> test that we urged the Court below to subject the legal and regulatory provisions to, and it erroneously declined, denying our facial constitutional attack.

**Under the O'Brien Test, The Casino Advertising Ban Does Not Withstand Strict Judicial Scrutiny**

The test requires that the state action be within the constitutional power of the Government, that it furthers an important or substantial governmental interest, that the government interest is unrelated to suppression of free expression, and that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien* is applied when a law or regulation incidentally limits speech.

In our case, Section 8 cannot be construed as an incidental restriction of speech, nor can the government interest

<sup>14</sup> *U.S. v. Mary T. Grace*, 461 U.S. 171 (1983)

<sup>15</sup> *U.S. v. O'Brien*, 391 U.S. at 376-377 (1968)

be construed to be unrelated to the suppression of speech. Since we have discussed two of the four prongs of this test under the *Central Hudson* doctrine, we find it unnecessary to repeat them. But, we must emphasize, that while eight of the nine provisions that make up Act 221 are related to the regulation of gaming for the purposes stated in Section 1, within the constitutional powers of the Commonwealth; Section 8 is an island by itself. Severable! It bears no relation to the remaining Sections and carries a separate implied government interest.

We cannot find that the state interest involved is *unrelated* to the suppression of free expression. Quite contrary, its whole object is the abridgment of freedom of speech if in any manner it bears some relation to casinos. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1974). While states have constitutional powers to regulate economic activities, there is no comparable right to infringe on core speech. *N.A.A.C.P. v. Clairborne Hardware Co.*, 50 LW 5122 (1982). Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech. *Consolidated Edison, supra*.

The Section 8 restriction on First Amendment protected speech can hardly be said to be no greater than necessary to the furtherance of the interests advanced by Tourism. We are not before reasonable time, place and manner restrictions as recently upheld in *Clark v. Community for Creative Non-Violence*, 52 L.W. 4986 (1984).

People in Puerto Rico know there are casinos on the island. Whether they patronize them or not is an adult free decision-making process. The paternalistic position of government, as in *Virginia, supra*, has caused many tourists to come and leave the island without knowing that there are legalized casinos while tourists in-transit through our

international airport or seaport never find out. Nor does silence on gaming information necessarily encourage the Puerto Rican to earn his daily bread "with the sweat of his brow." An educational campaign on the "social evils" of gaming, or speech-inclusion requirement like "rum is harmful to your health" could be required by the Commonwealth. It is evident, however, that these alternatives are inconsistent with a state-operated lottery, and other speech unrestricted games sponsored by the Commonwealth. It is easier to unconstitutionally impose the burden on the casinos without even conducting a study to determine if the Commonwealth's own subjective view of gaming is correct.

In *Schad v. Borrough of Mt. Ephraim*, 452 U.S. 61 (1981), a total ban on nude entertainment was held unconstitutional by this Court because it was premised on the impermissible conception of what the majority considered "decency". To allow the Puerto Rican statutory ban to stand above Posada's protected rights on the unsupported premise that all gaming is a "social evil", when in fact it serves to promote tourism, would be to return to the *Capital Broadcasting*<sup>16</sup> early stage when truthful advertising was allowed to be forbidden in anything considered "harmful".

On point is Justice Blackmun's reasoning in *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 52 L.W. 4875 (1984):

"... Facial challenges to overly broad statutes are allowed not primarily for the litigant, but for the benefit of society—to prevent the statute from chilling First Amendment rights of other parties not before the Court."

And, on the merits, an "impermissibility" rationale that is also applicable to our case was set forth as follows: "The law as a whole lacked a 'a core of easily identifiable and constitutionally proscribable conduct . . . ' The flaw in the statute is not simply that it includes within its sweep *some*

<sup>16</sup> *Capital Broadcasting Co., v. Mitchell*, 405 U.S. 1000 (1972)

*impermissible applications*, but that in *all of its applications*, it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." The state action here is not valid as a narrowly drawn prohibition serving a compelling state interest. The statute in question is overly broad in violation of the Fifth and Fourteenth Amendments; and as such must be struck to avoid the dangers envisioned by this Court in *Near v. Minnesota*, 283 U.S. 697, 713 (1931): "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

#### **A Vague Law Threatens to Inhibit the Exercise of Constitutionally Protected Rights**

The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108, (1972) (MTD 12).

The 23 words that make up the contested provision set no guidelines as to what constitutes "advertise or otherwise offer their facilities" or who is considered "public". The Commonwealth cited the official translation of Section 8 (MTD 13) but did not inform this Court that the Spanish text, which is the one that prevails as the statute was drafted in said language, does not read "to the public of Puerto Rico" but "to the public *in* Puerto Rico".<sup>17</sup> It makes a difference! "The people of Puerto Rico" is a narrower term than "the people in Puerto Rico".<sup>18</sup>

<sup>17</sup> We find it a greater responsibility on our part as attorney to faithfully portray the text of the provision, not knowing whether the Court commands the Spanish language so as to make an independent evaluation of the statute, as it would normally do.

<sup>18</sup> The Spanish text reads: "No se permitira a ninguna sala de juegos el anunciarse o ofrecerse al publico *en* Puerto Rico en forma alguna . . ." If it were to mean to the public *of* Puerto Rico it should have read in Spanish: "No se permitira a ninguna sala de juegos el anunciarse o ofrecerse al publico *de* Puerto Rico". In addition, if the Legislature would have meant the *people* of Puerto Rico the proper use would have been "el *pueblo* de Puerto Rico."

Thus, it appears that even the Commonwealth makes a mistake in reading the statute from its face because of its vagueness. In addition, the Commonwealth reads the restriction as a mere economic restriction (MTD 13) while we read it as a penal statute that interferes with free speech.

This High Court's constitutional law development includes a recent decision affirming a Tenth Circuit Court of Appeals ruling striking down a statute prohibiting teachers from engaging in "public homosexual activity," defined as "advocating, soliciting, imposing, encouraging, or promoting public or private homosexual activity" as violating teacher's First Amendment rights. *Board of Education of the City of Oklahoma City v. National Gay Task Force*, 53 L.W. 4408 (1985). At least, said statute contained a definition of the proscribed conduct. Ours do not.

A facial challenge has been considered substantial when a statute imposes criminal or quasi-criminal penalties under the void-for-vagueness doctrine not only because actual notice be lacking but for the lack of requirements by the legislature to govern law enforcement. *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *Winters v. New York*, 333 U.S. 507, 515 (1948); *Hoffman Estates v. Flipside*, 455 U.S. 485, 498 (1982).

In the latter case, this Court stated that in reviewing a business regulation for facial vagueness, the principal inquiry is whether the law affords fair warning of what is proscribed. There was no evidence that the ordinance there had been enforced in a discriminatory manner, —contrary to our case (JSA B, 27b-9; 28b-10-15; 29b-18, 19). Since the Commonwealth relies on this case, we must also distinguish that, unlike ours, *Hoffman* did not deal with the infringement of First Amendment rights, another distinction.

The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. *Interstate*

*Circuit v. Dallas*, 390 U.S. 676 (1968). In this case, related to the licensing of movie films, a line of cases to support that precision is the touchstone when First Amendment rights are at stake were analyzed by the Court, reaffirming *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) as to "where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative (by vagueness)" and, "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law" (Id. at 701).

The concern here is the continuing potential for the arbitrary suppression of freedom of speech due to the overbreadth and vagueness of the controverted statutory section, two logically related doctrines that envelope the concept of due process of both the Fifth and Fourteenth Amendment of the Constitution. Section 8 censorship is vague in all of its possible applications and entrusts lawmaking to the moment to moment judgment of the Appellee. Thus, it does not meet constitutional standards for definiteness and clarity on its face.

#### **Statutes Impermissibly Proscribing Protected Conduct Based on Fundamentally Mistaken Premises Must Be Set Aside**

The overbroad and vague information ban deprives Posadas of fundamental constitutional rights on the impermissible premise that as a holder of a franchise granted by the Commonwealth of Puerto Rico, state action may require the relinquishment of constitutional rights, and specifically, may prohibit the flow of truthful information to the public in Puerto Rico of a legitimate, useful business activity that has helped the Puerto Rican economy.

The Commonwealth has assumed the impermissible position that it only can gain from the legalization of the

games of chance, by luring hotel investment; while if Posadas tries to conduct a profitable business, then gaming becomes a "social evil." The record shows that the economic position of hotels in Puerto Rico is precarious and that the problems of the industry have no short-term solution other than the promotion of the casinos, according to a study conducted by Tourism (R. Plaintiffs Exhibit 31, JSA B, 22b). Posadas must be allowed to do business as the legal business that it is, without an undue burden of threatening loss of its license or even imprisonment if it dares to speak about casinos.

The Commonwealth's contention that any and all advertising or information on casinos or gaming in Puerto Rico will have a deleterious social effect on the local people and negative effect of denial of security guarantees to the tourist is strictly speculative and cannot—under our constitutional framework—be permissible to prevail. The majority of the people gamble for entertainment in a social environment, and/or to fulfill a need for "belonging" to a special clan, or as a status symbol. The professional gambler or the compulsive gambler, will find his way to the casinos with or without any advertising. But, the normal person has the right to know about alternative adult leisure entertainment. The state is not the *pater familiae*. In point, is the *Virginia* reasoning:

"The First Amendment which was designed to prevent the Government from suppressing information, requires us "to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."

Section 8 is facially unconstitutional and must be struck down as requires the uniform application of the recognized protection afforded to freedom of speech.

### Conclusion.

We respectfully request from this High Court that it declare that Section 8 of Act 221 of May 15, 1948 is unconstitutional, on its face, insofar as the abridgment of speech is involved; that it sever the speech prohibition from the statute; and that it remand the case to the Commonwealth's Supreme Court for further proceedings consistent with its opinion.

Respectfully submitted,

MARIA MILAGROS SOTO  
Banco Central Building  
Suite 815  
Hato Rey, P.R. 00917  
Tels. 754-1920/1717  
Counsel for Appellant

December 12, 1985

**Appendix A.**

[Article 9 of Act 221 of May 15, 1948, as codified in 15 Laws of Puerto Rico annotated, Section 78, to show the history of amendments introduced to original text.]

**§78.—Penalties, franchise and/or license cancellation**

The Secretary of the Treasury may cancel the license granted under Sections 71-79 of this title to any person who (a) fails to meet the requirements demanded by Section 72 of this title; (b) fails to pay when due, or evades payment of the license fees; (c) being the operator of the hotel or establishment where the gambling hall is located and holding a license to operate said gambling hall, may have tax liabilities on any account already assessed and to be collected at the Internal Revenue offices or violate any plan agreed with and by the Secretary of the Treasury to pay the same, (d) promotes the use of slot machines by allowing free gambling in said machines, (e) violates any of the provisions of Sections 71-79 of this title or of the regulations prescribed for the enforcement hereof. The Department of the Treasury may impose administrative fines on a licensee in any of the cases referred to in this section, in a sum not less than one hundred (100) dollars nor more than ten thousand (10,000) dollars for each violation. The amount of the fine shall be covered into the general funds of the Treasury of Puerto Rico, and unless it is paid within thirty (30) days after notice thereof is served on the licensee, the Secretary of the Treasury may cancel the license or proceed to the collection of the fine, following the same procedure used for the collection of license fees.

Any person, licensee or attendant at a gambling hall who introduces or who uses or attempts to use a gambling device different in nature or specifications from those prescribed by law or by the regulations approved under the laws authorizing and regulating games of chance in a gambling casino, or who, with the criminal intent of appropriating money in cash or its equivalent, in any way alters the chance or operation of the slot machines, or in any way interferes with the acquisition of, transportation to, introduction, possession, use and/or operation of slot machines in Puerto Rico, in violation of the law or the regulations adopted authorizing said machines in Puerto Rico, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in jail for a minimum term of five (5) years and a maximum term of ten (10) years.

After the regulations prepared by the Tourist Company to govern everything concerning the games of chance are approved, pursuant to the procedure established in Section 671t of Title 23 and published by the Company, the same shall have force of law, and any violation thereof shall be a misdemeanor. Every person violating any of the provisions of Sections 71-79 of this title or of the regulations of the Company, except as otherwise provided herein, shall, upon conviction, be punished by a fine of not less than fifty (50) dollars nor more than five hundred (500) dollars, or by imprisonment in jail for a term of not less than one (1) month nor more than six (6) months, or by both penalties, in the discretion of the court.

Irrespective of the penalties prescribed in Sections 71-79 of this title, the Company and the Secretary of the Treasury are hereby empowered to punish administratively all violations of their orders and regulations by a fine not to exceed five hundred (500) dollars or by temporary suspension or revocation of the rights and

privileges enjoyed in the operation of the games of chance by the natural or artificial person guilty of the violation.

The Secretary of the Treasury or the Company may temporarily suspend or permanently cancel the franchises, licenses, rights and privileges enjoyed under Sections 71-79 of this title by any natural or juridical person.—Amended July 30, 1974, No. 2, Part 2, p. 587, §7; June 16, 1976, No. 5 p. 656, §2, eff. June 16, 1976; June 12, 1980, No. 115 p. 392, §§ 1, 2, eff. June 12, 1980.

### **Clarification**

Act June 12, 1980, No. 115, amending this section, in its statement of motives and Sections 1 and 2, provided that the amendment was to Section 2 of Act May 15, 1948, No. 221, Section 71 of this title, when in reality it meant Section 9, this Section 78.

### **—1980.**

The 1980 Act added “franchise” to title of section and reinstated the last three paragraphs which were eliminated by the 1976 amendment.

### **—1976.**

The 1976 Act inserted “licensee or attendant at a gambling hall” and “with the criminal intent of appropriating money in cash or its equivalent, in any manner alters the chance or operation of the slot machines” in present last paragraph, and eliminated the three last paragraphs which referred to regulations prepared by the Company, power to punish administratively and temporary suspension or permanent cancellation of franchises, respectively.

—1974.

The 1974 Act amended this section generally.

**Statement of motives.**

See Laws of Puerto Rico:

June 16, 1976, No. 5, p. 656.

June 12, 1980, No. 115, p. 392.

**Effectiveness of Act July 30, 1974, No. 2.**

See Section 79a of this title.

**Misdemeanors; maximum penalties.**

Section 1 of Act 7, 1971, No. 9, Section 1712(a) of Title 34, provided that the term of imprisonment for misdemeanors shall not exceed 6 months; and Section 2 of such act, Section 1712(b) of Title 34, established a maximum fine of \$400 for the offense.

**Fixed sentence system.**

Act June 4, 1980, No. 100, repealed the indeterminate sentence system in Puerto Rico, and provided that where a sentence of imprisonment is imposed, a fixed sentence of specific duration is set according to the statute violated. See Section 1044 of Title 34.

**Appendix B.**

**1985 Gaming Regulations**

**SECTION 4 - RULES FOR PLAYERS**

(a) No person under 18 years of age will be permitted in the gaming room.

(b) The players at each table should, at all times, conduct themselves properly, not raising his or her voice unnecessarily or conduct himself in such a manner as to irritate the other players congregated in the gambling casino and/or interrupt or delay the normal conduct of the game.

(c) All players are subject to the provisions of this subchapter which apply to them.

(d) No intoxicated or disorderly person will be allowed in the casino. No alcoholic beverages may be served or consumed in the gambling casino.

(e) *The concessionaire will determine how formal the attire of his clients shall be, always maintaining an image of propriety and decor.*

(f) No person will be permitted to possess in the gaming room, by himself or with other persons, with the intention to use or using in any game, calculators, computers or any other device, electronic, electric and/or mechanical.

[All the other sections of the Gaming Regulations  
Amended in 1985, omitted in printing]

**Appendix C.****Casino Gambling in Puerto Rico**

[Excerpt from Gaming in America]

The Commonwealth of Puerto Rico is the only American jurisdiction outside of the State of Nevada where legal casino gambling is operated. Gambling has traditionally been a part of Puerto Rican culture; gaming houses, cockfighting, and horseracing existed in Puerto Rico during Spanish sovereignty. However, it was not until the emergence of the tourist industry as a major source of revenue to the island that casino gambling was legalized. The Games of Chance Act, permitting the operation of casinos, was passed on May 15, 1948, and the casino regulations followed on August 22, 1949. The primary force behind passage of this legislation was the desire to develop tourism. Prior to that time, various casinos operated sporadically, patronized primarily by Puerto Ricans. With the legalization of casino gambling, however, patronage changed radically: Ninety-two to 95 percent of the players now consist of visitors to the island.

The political policy toward gambling has been one of strict government intervention designed to discourage major scandal and unlimited gambling profits. The Commonwealth attempts to prevent dominance of gambling as a tourist attraction, and encourages it only so long as it remains just one of several attractions offered to visitors. Such close supervision has led to an image of fair play and integrity of operation in Puerto Rican casino games. That image is further promoted by the continuous presence of government inspectors in the casinos who test the equipment and scrutinize the play. These inspectors are employed by the Tourism Development Company, the

governmental agency vested with authority over gambling operations and regulation.

Other regulations which have been enacted with an eye toward preserving the dignity of the surroundings include a strict dress code for players as well as employees, prohibition of alcoholic beverages or inebriated persons within the casinos, specifications as to the size of hotels that may be permitted to house casinos, minimum and maximum limits on wagers, and specific hours during which casinos may be operated. Adding to the rigidity of these regulations is the fact that any change requires approval by the Legislative Assembly.

The economic impact of casinos has been substantial. Approximately 63 percent of the total number of hotel rooms in Puerto Rico belong to hotels with casinos, and these hotels provide employment to 81 percent of all those employed in the tourist industry. The 11 hotels with casinos clearly represent the base of the island's tourist industry. In recent years, however, casinos' contributions to the economy have been diminishing. Several factors have been cited as contributing to this diminution; the general economic contraction of the entire tourist industry, spiraling labor costs and benefits, and taxation. Some attempts have been made to alleviate the problem. Hotels, but not casinos, for instance, enjoy tax exempt status. Permission has been granted to hotels with casinos to charge an overhead deduction against the casino operation in proportion to the total gross income derived from hotel and casino operations, thereby providing a partial subsidy to casino operations.

## Appendix D

Listing Under Rule 28 of the Rules of the Supreme Court.

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\*The Condado Holiday Inn Hotel and Casino was sold on September, 1983, is now reorganized as a public corporation under the laws of Delaware as Posadas de Puerto Rico Associates, Inc., and is presently doing business as Condado Plaza Hotel & Casino as a successor business with the same management. A prior listing under Rule 28 of the Rules of the Supreme Court is hereby amended to reflect that Williams Electronics, Inc., a Delaware public corporation, through a wholly owned subsidiary, Williams Hotel Corp., has 80% of the Posadas de Puerto Rico Associates, Inc. stock. Williams Electronics Inc. also has a 50% interest in Posadas de San Juan Associates, a New York Partnership, through E.S.J. Hotel Corp., a wholly owned subsidiary; and a 50% interest in Williams Hospitality Management Corp. The remaining 20% shares in Posadas de Puerto Rico Associates, Inc. are owned: 5% by Hugh A. Andrews, former General Manager, and 15% by Burton I. Koffman, as Nominee. The Koffmans were private stockholders of Cenkoff, Inc., a New York Corporation. Andrews and Koffman hold a 10% and 35% interest in Williams Hospitality Management Corp., respectively. In Posadas de San Juan Associates, Andrews holds a 10% interest through IHS Associates, Ltd., a Delaware corporation. The Koffmans on their part, are private stockholders of K & C Holding Corporation, a New York corporation, which has a 25% interest in Posadas de San Juan Associates through Midwest Property Corp., a wholly owned subsidiary. Posadas de San Juan Associates began doing business as El San Juan Hotel and Casino on December 10, 1985.

**APPELLEE'S**

**BRIEF**

No. 84-1903

Supreme Court, U.S.

FILED

FEB 15 1986

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a CONDADO HOLIDAY INN,

*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO, *et al.*,

*Appellees.*

On Appeal from the Supreme Court of Puerto Rico

**BRIEF FOR APPELLEES**

HECTOR RIVERA CRUZ  
Secretary of Justice  
Commonwealth of Puerto Rico

RAFAEL ORTIZ CARRION  
Solicitor General  
Commonwealth of Puerto Rico

LINO J. SALDAÑA  
(*Counsel of Record*)  
SALDAÑA, REY, MORAN & ALVARADO  
P. O. Box 13954  
Santurce, Puerto Rico 00908  
Tel. (809) 721-6345

*Attorneys for Appellees*

February 15, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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## QUESTIONS PRESENTED

1. Whether advertising of casinos in Puerto Rico to promote gambling is protected by the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the restrictions imposed by Puerto Rico on the advertising of appellant's gambling casino directly advance substantial governmental interests and are not more extensive than is necessary to serve those interests.

3. Whether the restrictions imposed by Puerto Rico on the advertising of appellant's gambling casino violate the equal protection guarantee of either the Fifth or the Fourteenth Amendments.

4. Whether the restrictions imposed by Puerto Rico on the advertising of appellant's gambling casino violate the Due Process Clause of either the Fifth or the Fourteenth Amendments.

---

\* The Appellees in the Supreme Court of Puerto Rico were the Tourism Company of Puerto Rico, which is a public corporation and instrumentality of the Commonwealth of Puerto Rico, 23 L.P.R.A., Secs. 671 to 671(t) and the Commonwealth of Puerto Rico itself.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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No. 84-1903

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POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a CONDADO HOLIDAY INN,  
*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO, *et al.*,  
*Appellees.*

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On Appeal from the Supreme Court of Puerto Rico

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**BRIEF FOR APPELLEES**

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**JUDGMENTS AND OPINION BELOW**

The judgment of the Supreme Court of Puerto Rico, dated February 7, 1985, dismissing appellant's writ of appeal on the ground that it did not present a substantial constitutional question, is not officially reported. A translation is printed as Appendix A of the Jurisdictional Statement ("J.S."). The declaratory judgment and opinion of the Superior Court of Puerto Rico, dated December 12, 1984, from which the appeal was taken, is also unreported. A translation is printed in J.S. Appendix B. An error in the printed translation of the Superior Court's opinion has been corrected in the Joint Appendix ("J.A.") at Page 112a.

## JURISDICTION

On October 21, 1985, this Court entered an order postponing consideration of the question of jurisdiction till the hearing on the merits. According to Rule 16.8 of this Court: "If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction."

Because this case comes on appeal from the Supreme Court of Puerto Rico, the relevant jurisdictional statute is 28 U.S.C. § 1258(2). The jurisdiction so conferred upon this Court is similar to its jurisdiction to review by appeal final judgments or decrees of state courts under 28 U.S.C. § 1257(2).<sup>1</sup> Subsection 2 of Section 1258 requires that appellants have drawn in question in the Commonwealth courts the validity of a statute of Puerto Rico on the ground of its being repugnant to the federal Constitution treaties or laws and that the decision from which the appeal is taken is in favor of its validity. Similarly, Rule 15.1(g) of this Court requires appellant to specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court. The burden of showing that the Commonwealth statute was explicitly challenged and that the federal questions were timely and properly raised and preserved at all stages of the Commonwealth proceedings rests on the appellant. See, e.g., *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649,

<sup>1</sup> Although 1258 is copied almost verbatim from the provisions in Section 1257, review by appeal or certiorari is allowed only from final judgments or decrees of the Supreme Court of Puerto Rico, not from those rendered by the highest court of Puerto Rico in which a decision could be had. It should also be noted that 28 USC § 2103, which authorizes this Court to treat in proper circumstances an improvident appeal from a state court as a petition for certiorari, does not include any such provision for an improvident appeal from the Supreme Court of Puerto Rico.

651 (1942), and *Raley v. Ohio*, 360 U.S. 423, 435 (1959). This jurisdictional factor is especially significant where, as here, the highest Puerto Rico court has failed or refused to pass expressly upon the federal questions tendered in this appeal. In such situation, "... it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

An examination of the record shows that the claim of invalidity of the Puerto Rico statute and regulations involved in this appeal, and the federal grounds therefor, were not presented explicitly, with fair precision and particularity, in the Commonwealth proceedings in this case. First, appellant did not challenge at all the statute in the administrative proceedings. Secondly, in the Superior Court the validity of the statute and the regulations were not drawn in question with sufficient particularity in a manner directly bearing on the merits of the declaratory action and upon the allegedly infringed constitutional rights of the appellant. Thirdly, neither the claim of invalidity nor the federal grounds therefor were timely and properly brought to the attention of the Supreme Court of Puerto Rico.

### **The Statute Was Not Challenged In The Administrative Proceedings**

On February 24, 1982, appellant requested a revision of the Tourism Company's ruling of February 16, 1979 regarding the interpretation of the prohibition as to advertising contained in Section 8 of the Games of Chance Act of 1948, 15 L.P.R.A. § 77, and in the regulations enacted pursuant thereto, 15 R.R.P.R. § 76-218 and 76a-1(7). See J.S. Appendix H.<sup>2</sup> Appellant did not attack the validity of the statute

<sup>2</sup> Section 8 of the Games of Chance Act of 1948, as amended, provides as follows: "No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico; or to admit persons

or the regulations under the federal Constitution or laws. Contrary to the assertion made in Appellant's Brief (p. 7), it is quite clear that no federal question of any nature was raised in the proceeding for a revision of the Tourism Company's ruling as to the interpretation of the statutory advertising prohibition. See J.S. Appendix H.

**The Claim Of Invalidity Of The Statute Was Not Properly Presented To The Superior Court**

The averments of the appellant's declaratory judgment complaint filed in the Superior Court of Puerto Rico on March 12, 1982 lack sufficient precision to adequately present a challenge to the statute and the regulations on federal grounds. Read in its entirety, the complaint sets forth a controversy between appellant and the Tourism Company regarding the interpretation of the statutory provision and the regulations relating to advertising of the gambling casinos. J.S. Appendix I, Par. 5. Appellant Posadas castigated the Tourism Company's "literal interpretation of the law which produced absurd and unreasonable results." J.S. Appendix I, Par. 6. Such interpretation of the gaming laws and regulations, calling for "an absolute ban on the gaming rooms to advertise," was challenged as "unconstitutional" because it violated "the constitutional rights of petitioner

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under eighteen years of age." 15 L.P.R.A. § 77. Regulation 76-218 reiterates word by word the prohibition of Section 8. It provides that "No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico; or to admit persons under eighteen years of age." Regulation 76a-1(7), as amended on June 29, 1971, provides as follows: "No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. It is hereby authorized the advertising of our games of chance through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company. Without the previous authorization by the Company, no one shall be allowed to photograph, or film movies within the gambling parlors." 15 R.R.P.R. § 76a-1(7).

protected by the First Amendment to the Constitution of the United States, and of Puerto Rico," and "the constitutional guarantee of equal protection of the laws protected by the Constitution of the United States and Puerto Rico since other games of chance, such as the lottery, horse races and cock fights are allowed to advertise to the public in Puerto Rico, of which we request the court to take judicial notice." J.S. Appendix E, Par. 9. Paragraphs 10 and 11 of the complaint were also addressed to the administrative interpretation of the statute and its regulations. In the prayer of the complaint appellant did not request the Superior Court to declare unconstitutional on federal grounds the statutory provision and the regulations prohibiting advertisement of casino. *Ibid.*, 4i and 5i. In short, the statute's validity under federal law was never explicitly challenged, but rather the administrative interpretation of the law which allegedly violated appellant's constitutional rights. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n.4 (1980).

In its declaratory judgment and opinion entered on December 12, 1984, the Superior Court of Puerto Rico failed to pass upon or even to mention in a cursory manner any question concerning the validity under the federal Constitution of the statute and its regulations. J.S. Appendix B. Obviously the Court concluded that no such federal question had been raised by appellant in the trial court. This is reflected in the Court's last two conclusions of law. Conclusion No. 13 stated barely: "Sections 1, 4, 6, 7 and 20 of Article II, Bill of Rights of the Constitution of Puerto Rico, and the first, fifth and fourteenth amendments of the Constitution of the United States are applicable to the controversy in this action". *Ibid.*, 34b. In contrast, conclusion 14 expressly asserted: "According to law we issue a declaratory judgment because there is a controversy of interpretation regarding a statute which affects statutory and constitutional rights. (32 L.P.R.A., Ap. III R. 59, *Charana v. Pueblo*, 1980, 109 D.P.R. 641.)" *Ibid.*, 34b.

**The Claim Of Invalidity Of The Statute Was Not Timely And Properly Presented To The Supreme Court Of Puerto Rico**

Section 37(a) of the Puerto Rico Judiciary Act of 1952, as amended, 4 L.P.R.A. § 37, provides that "... final judgments rendered by the Superior Court in civil cases involving or deciding a substantial constitutional question under the Constitution of the United States or of Puerto Rico shall be appealable to the Supreme Court." Any other final judgment of the Superior Court may be reviewed by the Supreme Court "... through a writ of review to be issued at its discretion." 4 L.P.R.A. § 37(b). The procedure under which an appeal may be taken is established by rules of the Supreme Court. Rule 53.1(a) of the Puerto Rico Rules of Civil Procedure provides that "an appeal is perfected by filing a notice of appeal with the clerk of the part of the court where the case was heard and by filing a copy with the clerk of the appellate court within thirty (30) days after the entry of a copy of the notice of judgment." 32 L.P.R.A. App. III, R. 53.1(a). The constitutional issues raised must be set forth in the notice of appeal. 32 L.P.R.A. App. III, R. 53.2.

The declaratory judgment of the Superior Court dated December 12, 1984 was docketed or registered on December 14, 1984. The 30-day term for filing the notice of appeal from that judgment expired on January 14, 1985 at 5:00 PM pursuant to Rule 48(a) of the Rules of the Supreme Court of Puerto Rico. 4 L.P.R.A. App. I-A, R. 48(a). The appellant's notice of appeal in this case was filed with the office of the Clerk of the Supreme Court of Puerto Rico on January 14, 1985 at 5:06 PM.<sup>3</sup> Thus, the notice of appeal was filed *after* the 30-day term had expired.

The Supreme Court of Puerto Rico, undoubtedly unaware of the fact that the appeal was untimely, considered the

<sup>3</sup> See the certificate of the Acting Chief Clerk of the Supreme Court of Puerto Rico dated January 14, 1986 which is printed as Appendix A to this Brief.

further jurisdictional issue as to whether a substantial constitutional question was presented in the appeal, determined that there was none, and dismissed the appeal. There is no doubt, however, that the appeal was untimely. Under Rule 48(a), as interpreted in *Tim Manufacturing Co. v. Shelley, et al.*, 107 D.P.R. 530 (1978),<sup>4</sup> the Court would have dismissed the appeal without passing upon the merits, if at any time the late filing of the notice of appeal had been brought to its attention. It is true that appellant filed a notice of appeal in the Superior Court before 5:00 PM on January 14, 1985, but a copy of said notice of appeal must also be filed with the Supreme Court within the specified period of time in order to perfect the appeal in accordance with Rule 53.1(a) of the Puerto Rico Rules of Civil Procedure. 32 L.P.R.A. App. III, R. 53.1(a).<sup>5</sup>

It is essential to the jurisdiction of this Court under Section 1258(2), that the claim of invalidity of the statute and the federal grounds therefor have been timely and properly presented to the Supreme Court of Puerto Rico. The appellant did not comply with this jurisdictional requirement because, as we have shown, his appeal was untimely. In addition, the record shows that appellant failed to bring

<sup>4</sup> An official translation of this decision is printed in Appendix B to this Brief.

<sup>5</sup> The requirement that a copy of the notice of appeal be filed with the Supreme Court was established, as an amendment to Rule 53.1 of the Puerto Rico Rules of Civil Procedure, by Law No. 23 of July 10, 1978. By Law No. 77 of June 23, 1978 amending Rule 194 of the Puerto Rico Rules of Criminal Procedure, 34 L.P.R.A. App. II, R. 194, a similar requirement was established for notices of appeal in criminal cases. The filing of the copy of the notice of appeal in the appellate tribunal in criminal cases must be made within 48 hours after the filing of the notice of appeal in the sentencing court. The Supreme Court has held that in criminal cases the 48-hour term is not a "jurisdictional barrier", but that it establishes a "norm to be rigorously fulfilled", a term that must be "most strictly complied with." See *Pueblo v. Fragoso Sierra*, 109 D.P.R. 536 (1980). An official translation of the *Fragoso Sierra* decision is printed in Appendix C to this Brief.

the federal claim and the grounds therefor to the Supreme Court's attention explicitly and with the degree of specificity required. A translation of the notice of appeal is printed as Appendix C(2) of appellant's Jurisdictional Statement. Because there are important errors in J.S. Appendix C, an official translation is reprinted as Appendix D to this Brief.

The notice of appeal states that: "The bar against advertising casinos to the public in Puerto Rico infringes upon the right of expression protected by the Bill of Rights of our Constitution and of the United States Constitution." Appendix D to this Brief. This is not sufficient to raise an issue as to the validity of the Puerto Rico statute under Section 1258(2). The statute must have been "drawn in question" by explicit challenge to the validity of the specific statute and by reference to the particular clause of the federal Constitution relied upon, as well as the rights claimed thereunder. Issues as to the validity of Commonwealth statutes must be specifically presented as such; not as more general constitutional challenges to Commonwealth action. Otherwise the highest court of the Commonwealth is not given the opportunity to construe the statute and to determine the way in which it should be applied. See *Cardinale v. State of Louisiana*, 394 U.S. 437, 438-439 (1969); *Webb v. Webb*, 451 U.S. 493, 498-501 (1981); and *District of Columbia Board of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983).

The remaining claims and contentions set forth in the notice of appeal under the heading of "Constitutional Issues Raised" are even more inadequate to raise an explicit challenge to the Puerto Rico statute. Appellant stated that "the vagueness and overbreadth not only infringes upon the constitutional freedom of speech, but also violates the due process of law guaranteed by the Constitution in failing to give adequate publicity to the conduct proscribed . . ." Appendix D to this Brief. The difficulty with this constitutional contention is that the Constitution of Puerto

Rico protects both freedom of speech and due process of law. Thus, it does not challenge the validity of the statute on federal grounds. Another constitutional issue was framed by appellant in the following terms: "A law that bars the holder of a license to operate a legal gambling business from fully advertising his endeavor creates a classification in terms of the protection afforded by the first amendment of the Constitution of the United States and by our Bill of Rights, particularly when it allows similar businesses to advertise themselves." Obviously the mistaken reference to the First Amendment in lieu of a proper reference to the Fifth or the Fourteenth Amendments is insufficient to bring a federal claim and the grounds therefor to the Puerto Rico Supreme Court's attention with fair precision.

In closing his statement on the "Constitutional Issues Raised," the appellant states that the following constitutional controversies "must be resolved":

- "1. Whether section 8 of Act No. 221 of May 15, 1948, as amended, is unconstitutional because it violates the right of free expression in general; and the freedom of commercial speech in particular.
2. Whether section 8 of said Act is unconstitutional because it violates the equal protection of the laws.
3. Whether the aforesaid section 8 is unconstitutional due to its over-breadth and vagueness because it lacks the reasonable guidelines or parameters in violation of the due process guarantee.
4. Whether the absolute bar or prior restraint on the publication of any advertising about casinos—vis-a-vis the vagueness and latitude of the statute, and in view that no other legal game classifications are forbidden from advertising in Puerto Rico—warrants a strict judicial scrutiny to uphold a decree of constitutionality.
5. Whether the state interest surpasses the rigor of the constitutional clause in case the cited section of the act, and the regulatory provisions adopted thereunder, violate the fundamental right to the freedom of speech.

6. Whether the statutory bar is broader than necessary for protecting the public purpose sought, and, hence unconstitutional." Appendix D to this Brief.

This list of constitutional issues does not include any challenge to the statute on federal grounds. No federal question is presented, because no provision of the Federal, as distinguished from the Commonwealth Constitution, was relied upon.

To show that the federal question concerning the validity of the Puerto Rico statute was properly presented to the Supreme Court of Puerto Rico, the appellant finally refers to the Motion for Reconsideration which was filed in that Court on February 2, 1985. Appendix E to this Brief. It is well established, however, that the proper and timely presentation requirements are not satisfied when, as here, the validity of the statute is drawn in question for the first time upon a Motion for Reconsideration or Re-hearing of the Judgment rendered by the Supreme Court of Puerto Rico, and that Court did not entertain nor decide the federal questions so advanced. See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 243-244 (1958) and *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

In summary, appellant Posadas has failed to carry the burden of proving that the Commonwealth statute was explicitly challenged with fair precision and particularity and that the federal questions tendered in this appeal were timely and properly raised and preserved at all stages of the Commonwealth proceedings. This appeal should be dismissed and review should be denied for want of jurisdiction.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fifth Amendment to the United States Constitution provides that:

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

The Fourteenth Amendment to the United States Constitution provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1, Article II of the Constitution of Puerto Rico, 1 L.P.R.A., Constitution of the Commonwealth of Puerto Rico, at page 238, provides that:

The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas.

Section 4, Article II of the Constitution of Puerto Rico, 1 L.P.R.A., Constitution of the Commonwealth of Puerto Rico, at page 244, provides that:

No law shall be made abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Section 7, Article II of the Constitution of Puerto Rico, 1 L.P.R.A., Constitution of the Commonwealth of Puerto Rico, at page 250, provides that:

The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist. No person shall be deprived of his liberty or property without due process of law. No person in Puerto Rico shall be denied the equal protection of the laws.

Section 8 of the Puerto Rico Games of Chance Act of 1948, as amended, 15 L.P.R.A. § 77, provides that:

No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico; or to admit persons under eighteen years of age.

Section 76-218 of the Games of Chance Regulations, 15 R.R.P.R. § 76-218, provides that:

No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico; or to admit persons under eighteen years of age.

Section 76a-1(7) of the Games of Chance Act Regulations, 15 R.R.P.R. § 76a-1(7), as amended on May 22, 1971, provides that

No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. It is hereby authorized the advertising of our games of chance through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company. Without the previous authorization by the Company, no one shall be allowed to photograph, or film movies within the gambling parlors.

#### STATEMENT OF THE CASE

Posadas operates a casino in Puerto Rico under a franchise granted in 1975 and renewed from time to time under the provisions of the Puerto Rico Games of Chance Act of 1948, 15 L.P.R.A. §§ 71-84, and its corresponding Regulations. 15 R.R.P.R. §§ 76-201 to 218 and 76a-1 to 70. The Games of Chance Act prohibits casinos from advertising or otherwise offering their facilities to the public of Puerto Rico, 15 L.P.R.A. § 77. The regulations prohibit any concessionaire of a casino franchise, and its agents or employees to advertise "the gambling parlors" to the public in Puerto Rico. As to advertising outside of Puerto Rico, the regulations authorize the concessionaire to advertise its games of chance through newspapers, magazines, radio, television and other publicity media subject to the prior

editing and approval by the Tourism Company of the advertisement which must be submitted in draft to the Company. The regulations also provide that without the previous authorization of the Tourism Company, no one shall be allowed to photograph or film movies within the gambling parlors. 15 R.R.P.R. § 76a-1(7). Casino licenses or franchises granted to any person who violates these prohibitions may be cancelled by the Secretary of the Treasury of Puerto Rico. 15 L.P.R.A. § 78. The casino franchise granted to appellant includes as one of its conditions the obligation to refrain from advertising or otherwise offering its facilities to the public of Puerto Rico. J.S. Appendix B, 27b, ff 8.

Neither the regulations nor the government agencies concerned with the prohibition relating to casino advertisements established definitions of what constitutes announcing or offering to the public in Puerto Rico the facilities of the gambling casinos. The Tourism Company and its gaming director applied the law and regulations on a case-by-case basis, and exercised their discretion "inconsistently and through the years allowed and prohibited similar conduct, depending on the criteria of the official at a given time." *Ibid.*, 27b, ff 6-9. In 1978 an advertisement congratulating the Condado Holiday Inn for the inauguration of a new addition to its facilities was published by the Union of its casino employees. A picture or photograph of a roulette table surrounded by players and the name of the Casino Employees Association of the Condado Holiday Inn were used in said advertisement. J.S. Appendix B, 15b; J.A. 70a. Also, in the special newspaper supplement in which that advertisement was published, a photograph of Posadas' casino manager was published with his name and title. The Tourism Company admonished appellant Posadas that in its judgment these advertisements violated the Games of Chance Act and its regulations. No fine was imposed on appellant for these alleged violations. The Tourism Company, however, did impose a fine of \$500 on

Posadas for not having answered its letter of warning. It also indicated to appellant that the use of the word "casino" in its letterhead constituted a prohibited advertisement. J.S. Appendix B, 15b-16b. A second \$500 fine was imposed on Posadas for advertising its casino in the Puerto Rico telephone directory, in local newspapers and other publicity media. J.A. 32a. By mutual agreement the fines were held in abeyance until a ruling on the interpretation of the prohibition of casino advertising was issued by the Tourism Company. J.S. Appendix B, 17b.

On February 16, 1979 the Tourism Company issued a ruling, interpreting the prohibition of casino advertising to include the use of the word "casino" in matchboxes, lighters, envelopes, internal and/or external letterheads, invoices, menus, napkins, brochures, elevators, glasses, plateware, lobbies, banners, flyers, paper holders, pencils, telephone book, directories, billboards, or in any dependency of the hotel or object which may be accessible to the public in Puerto Rico. At that time the 1978 fines were reinstated and a new one of \$500 was imposed for placing a brochure of the casino in a guest room in the Condado Holiday Inn Hotel. J.S. Appendix B, 18b. Appellant Posadas was also warned that its franchise would not be renewed unless it paid the fines totalling \$1,500. Because of the proximity of the expiration date of its gambling license, which had to be renewed every three months, Posadas paid the fines. J.S. Appendix 18b.

On July 31, 1981 another controversy arose between appellant Posadas and the Tourism Company regarding the interpretation of the prohibition of casino advertising. A press conference was called by Posadas' manager, who was also president of the Puerto Rico Hotel and Tourism Association, to protest against the proposed elimination by the Government of Puerto Rico of one-third of the slot machines located in the casinos operating in Puerto Rico. He conducted the reporters to the casino of the Condado Holiday Inn Hotel where he held a mock funeral service by

placing a black ribbon on the slot machines to be removed. The press took photographs of Posadas' general manager in the casino standing in front of a row of slot machines. On the following day, a San Juan newspaper published an article with said photographs in which the government's plan to remove the slot machines from Posadas' casino was criticized. J.S. Appendix B 18b-19b; J.A. 56a. The Tourism Company determined that the publication of the photographs was a violation of the existing prohibition of casino advertising. J.S. Appendix B, 21b. A \$500 fine was imposed on appellant who paid it on September 18, 1981 under protest to obtain the renewal of its gambling license. J.A. 60; J.S. Appendix B, 19b.

In 1982 the New Jersey Gaming Commission considered a report recommending that a petition for a franchise to operate a casino be denied to appellant's parent company, Inns of America, on the ground that Inns of America did not qualify for a license in New Jersey. Among other factors the report indicated that Posadas had violated the gaming laws and regulations in its operations in Puerto Rico by publishing prohibited advertisements in 1978 and 1981. The New Jersey Gaming Enforcement Division also indicated in its report that three casino advertisements were published by appellant promoting the Condado Holiday Inn and Casino in the Atlantic Boardwalk and in the television program "Joker's Wild" without submission for prior approval to the Tourism Company of Puerto Rico. J.A. 69a-71a; J.S. Appendix B, 19b.

On February 24, 1982 Posadas requested a revision of the Tourism Company's ruling of February 16, 1979, regarding the interpretation of the casino advertising prohibition. Appellant called on Tourism to adopt a narrow interpretation of advertising that would safeguard the public from mass advertising but would permit the industry to inform its guests of the nature of its facilities, their location and hours, including casinos, to identify the casino employees for purposes other than advertising, and to allow promotion of casinos through souvenirs, distributed to hotel

guests. Appellant requested that communications or information concerning the casino not directed to attract the public of Puerto Rico to gamble but addressed to the public already in the hotel premises as guests should not be considered advertising. J.S. Appendix H, 1h-6h. The Tourism Company did not accede to revise its ruling of February 16, 1979. Having exhausted its administrative remedies, Posadas filed on March 12, 1982 a declaratory judgment suit against the Tourism Company in the Superior Court of Puerto Rico. J.S. Appendix I.

After a trial on the merits, the Superior Court, per Guillermo Arbona Lago, J., rendered a declaratory judgment on December 12, 1984. It held that the administrative interpretation of the statutory prohibition relating to advertising of gambling casinos is "excessively broad and surpasses the legislative intent producing absurd and unreasonable results, such as prohibiting the casinos from identifying themselves even within the hotels . . ." and ". . . conflicts with the legislative intent of legalizing gambling to promote tourism as is the custom in the great touristic centers of the world." J.S. Appendix B, 28b (ff 12 and ff 16). The court also ruled that in enacting Section 8 of the Games of Chance Act ". . . the legislator was worried about the participation of the residents of Puerto Rico on what on that date constituted an experiment, since one does not legislate without a purpose nor in an impractical manner. Therefore, he prohibited the gaming rooms from announcing themselves or offering themselves to the public—which we reasonably infer are the *bona fide* residents of Puerto Rico. Another interpretation conveys the absurdity that the tourist that is on the Island cannot be offered the casino—something which is contrary to what the legislator promoted. Therefore, we also conclude that what the legislator foresaw and prohibited was the invitation to play at the casinos through publicity campaigns or advertising in Puerto Rico addressed to the resident of Puerto Rico. He wanted to protect him." *Ibid.*, 32b, c.1.8.

In order to reconcile the interpretation of the advertising prohibition with the legislative intent of promoting tourism which is "so critical for our economy" (*Ibid.*, 32b, c.1.10) and "to save the constitutionality of the law" (*Ibid.*, 35b), the Superior Court adopted a restrictive interpretation of Section 8. It declared that "Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos", (J.A. 112a.) with the following exceptions and limitations:

1. Publicity of the casinos is allowed in newspapers, magazines, radio, television or any other publicity media, of our games of chance in the exterior with the previous approval of the Tourism Company regarding the text of said ad, which must be submitted in draft to the Company. Provided, however, that no photographs may be taken nor movies be filmed within the casino for said advertisements without the approval of the Company.

2. Advertising by the casinos within the jurisdiction of Puerto Rico, addressed to tourists, is allowed provided they do not invite the residents of Puerto Rico to visit the casino, even though said advertisements may incidentally reach the hands of a resident. Within the ads of casinos allowed by this regulation figure, for illustrative purposes only, advertising distributed or placed in landed airplanes or cruise ships in jurisdictional waters and in restricted areas to travelers only in the international airport and the docks where tourist cruise ships arrive since the principal objective of said announcements is to make the tourist in transit through Puerto Rico aware of the availability of the games of chance as a tourist amenity: the ads of casinos in magazines for distribution primarily in Puerto Rico to the tourist, including the official guide of the Tourism Company "Qué Pasa en Puerto Rico" and any other tourist facility guide in Puerto Rico, even though said magazines may be available to the residents and in movies, television, radio, newspapers and trade magazines which may be published,

taped, or filmed in the exterior for tourism promotion in the exterior even though they may be exposed or incidentally circulated in Puerto Rico. For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourist.

3. Advertising in the mass communication media of the country is allowed where the trade name of the hotel is used even though it may contain a reference to the casino provided that the word casino is never used alone nor specified. Among the announcements allowed, by way of illustration, are the use of the trade name with which the hotel is identified for the promotion of special vacation packages and activities at the hotel, in invitations, "billboards," bulletins and programs or activities sponsored by the hotel. The use of the trade name, including the reference to the casino is also allowed in the hotel's facade, provided the word "casino" does not exceed in proportion the size of the rest of the name, and the utilization of lights and colors will be allowed if the rest of the laws regarding this application are complied with; and in the menus, napkins, glasses, tableware, glassware and other items used within the hotel, as well as in calling cards, envelopes and letterheads of the hotel and any other use which constitutes a means of identification.

4. The direct promotion of the casinos within the premises of the hotels is allowed. In-house guests and clients may receive any type of information and promotion regarding the location of the casino, its schedule and the procedure of the games as well as magazines, souvenirs, stirrers, matchboxes, cards, dice, chips, T-shirts, hats, photographs, postcards and similar items used by the tourism centers of the world.

5. Since a *clausus* enumeration of this regulation is unforeseeable, any other situation or incident relating to the legal restriction must be measured in light of the public policy of promoting tourism. If the object of the advertisement is the tourist, it passes legal scrutiny.

6. The entry into gaming rooms with cameras is allowed, but it shall be the concessionaire's responsibility to post, in a visible area within the casino, the rule that the taking of photographs within the casino is not allowed unless the taking of same inside the casino is authorized by the government inspector on duty and Management, and to adopt any preventive or corrective measures it may deem necessary regarding the misuse of this authorization, including the requirement that cameras be stored in bags which may contain the trade name of the hotel in question, or choose the option to inform that the abuse of this permission may imply confiscation of the film by Management or the Inspector, among others.

7. The concessionaire will determine how formal the dress of its clients must be, provided they maintain a proper and decorous image.

(J.A. 112a; J.S. Appendix B, 39b, 40b and 41b.)

The Superior Court finally declared in its judgment that:

1. The interpretation of the Tourism Company of Section 8 of the Gaming Act is clearly erroneous and exceeds the will of the Legislator as well as the letter of the law.

2. The application of the law and the regulation by Tourism ~~has~~ the defect of being unconstitutional because it has been arbitrary and capricious, ambiguous, inconsistent, erratic and excessive, producing absurd results which must be prevented in the interpretation, pursuant to the rules of legal construction.

3. By retroactively applying the norms which were unknown by Posadas, his rights to due process of law were violated and, if allowed to continue in force, the controverted administrative ruling would violate the constitutional rights guaranteed by Sections 1, 4 and 7 of the Bill of Rights of the Constitution of Puerto Rico, and therefore it is declared null and void.

4. The regulatory provision related to the use of jackets by men may have been valid at the time it was adopted,

but a condition based on the differentiation of sexes, is not valid today under our constitutional scheme and warrants that it be tempered to our times and state of law.

5. Section 8 of the law is not unconstitutional from its face and is sustained, modified by the guidelines issued by the Court on this date. These guides-regulations may be amended in the future by the enforcing agency pursuant to the dictates of the changing needs and in accordance with the law and what is resolved herein.

(J.S. Appendix B, 41b, 42b)

A notice of appeal to the Supreme Court of Puerto Rico from the declaratory judgment of the Superior Court was filed by Posadas both with the Clerk of the Superior Court and with the Clerk of the Supreme Court, as required by Rule 53.1(a) of the Puerto Rico Rules of Civil Procedure.\* The notice of appeal filed with the office of the Clerk of the Supreme Court was untimely. As we have shown, it was filed *after* the 30-day term prescribed in Rule 48(a) had expired.

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\* Rule 53.1(a) provides, as we have indicated previously, that "An appeal is perfected by filing a notice of appeal with the clerk of the part of the court where the case was heard and by filing a copy with the clerk of the appellate court within thirty (30) days after the entry of a copy of the notice of judgment. 32 L.P.R.A. App. III R. 53.1(a). Thus, under the procedure which governs appeals to the Supreme Court of Puerto Rico, from judgments issued in civil cases by the Superior Court, it is necessary in order to perfect the appeal to file not only a notice of appeal with the Clerk of the Superior Court where the case was heard, but also to file a copy of the notice of appeal with the Clerk of the Supreme Court. The time for filing the appeal is fixed at 30 days after the entry or docketing of the notice of judgment in the Superior Court. Pursuant to Rule 48(a) of the Rules of the Supreme Court of Puerto Rico: "Whenever pursuant to these rules or by order of the Court, papers must be filed with the Court within a specified period of time, or on a certain day, the term shall expire at 5:00 p.m. of the corresponding day." Posadas' notice of appeal was filed after 5:00 P.M. on the last day of the 30-day term in the office of the Clerk of the Supreme Court. 4 L.P.R.A. App. I-A, R 48(a). Jurisdictional terms are not subject to any extension of time. See Rule 48(b), 4 L.P.R.A. App. I-A, R 48(b).

Undoubtedly unaware of the fact that Posadas' appeal was untimely, the Supreme Court considered the further jurisdictional issue as to whether a substantial constitutional question was presented in the appeal, determined that there was none and dismissed the appeal. The Court also denied review treating the writ of appeal as a petition for review. J.S. Appendix A. Appellant Posadas' motion for reconsideration was summarily denied by the Supreme Court. J.S. Appendix E.

## SUMMARY OF ARGUMENT

### - I -

First Amendment protection should not be extended to advertising which promotes, stimulates or increases consumer demand for casino gambling activities which the Puerto Rico Legislature has legalized only upon strictly controlled conditions in order to avoid the potential social, political and economic harms related to excessive casino gambling, such as the increase in local crime, the disruption of moral and cultural patterns, the infiltration of organized crime, the increase in prostitution, the fostering of corruption, and the spending by lower income groups of a great percentage of their income in gambling. This is consistent with the limited measure of protection afforded to commercial speech, commensurate with its subordinate position in the scale of the First Amendment values, and with the rule that the protection available for any particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

Due to the potentially harmful and vice-prone nature of casino gambling, the Legislature of Puerto Rico undoubtedly could outlaw casino gambling entirely. It should also be able to regulate gambling if complete prohibition is considered impossible or undesirable by the Puerto Rico Legislature. Yet, to legalize casino gambling even under

strictly controlled conditions, while allowing casino owners to stimulate consumer demand for gambling and thus provoke excessive gambling, may also seem unreasonable and unadvisable. That is why advertising of gambling casinos should be excluded from First Amendment protection and the Legislature should be left free to regulate or to suppress such advertisements, just as it may prohibit advertising related to illegal behavior or to false, deceptive, or misleading sales techniques.

The values and interest at stake here are not of the same order as those involved in the cases where this Court has found it necessary to strike down government regulations or prohibitions of various forms of commercial speech. In all of them, commercial advertisements worthy of protection, because of their value to the free flow of information necessary for the operation of the market, and for public decision-making in a democracy, were involved. The value of such information to the advertisers and consumers, as well as to the society in general, was emphasized by this Court. In each case, the state interest in regulating commercial expression was weighed against the speech value of different categories of commercial speech. Here, the value of the gambling casino advertisements at issue, if any, is *de minimis*. Such advertisements provide no information which could be considered necessary or even helpful for a free market economy or for public decision-making. In contrast, Puerto Rico's interest in regulating advertising of casino gambling to prevent the increase or stimulation of demand for such gambling is exceedingly great and overwhelmingly outweighs the speech interest, if any, at stake in this case. The balance of competing interest is so strikingly clear that the advertising of gambling casinos should be considered, like advertising related to illegal behavior or to false, deceptive or misleading sales techniques, and like child pornography, offensive speech and obscenity, to be unprotected by the First Amendment.

- II -

Even if advertising of gambling casinos in Puerto Rico is held to be within the protection of the First Amendment, the restrictions here imposed are valid because they directly advance substantial governmental interests and are not more extensive than necessary to serve those interests. First, the Puerto Rico restrictions on advertising of appellant's gambling casino are designed to prevent artificial stimulation and increase of local demand for casino gambling which would otherwise result in excessive gambling by residents of Puerto Rico and adversely affect the health, safety and welfare of Puerto Rican citizens.

Second, there is a direct connection between advertising of gambling casinos and the demand for gambling in them. Common sense shows that, by its very nature, advertising of gambling casinos stimulates artificially and increases the demand for gambling. This results in excessive gambling by people who are attracted by those advertisements. The Puerto Rico Legislature accepted these common sense conclusions and its manifestly reasonable judgment should be upheld by this Court. The evidence presented to the lower court in this case confirms the accuracy of the Puerto Rico legislative judgment. Moreover, the writings and studies on legalized casino gambling in Nevada and New Jersey, as well as the judgments embodied in the English Gaming Act of 1968 and the findings of the English Royal Commission on Gambling, indicate that restrictions on advertising of gambling casinos serve as a direct and effective means of avoiding an increase in the demand for gambling and preventing excessive wide-open gambling, as well as its ensuing social, political and economic harms.

Third, the Puerto Rico advertising restrictions imposed on appellant are no broader than necessary to serve their goals. Puerto Rico does not impose a complete or absolute ban on advertising of gambling casinos to the public of Puerto Rico. As construed by the Superior Court, the statute prohibits only advertisements directed exclusively

to enticing residents of Puerto Rico to visit the casino and to use its facilities. There is no restriction whatsoever on advertising if the object of the advertisement is the tourist and not the resident of Puerto Rico. Advertisements in Puerto Rico addressed to tourists are not prohibited even though they may incidentally reach the hands of residents. Additionally, appellant Posadas is free to advertise its gambling casino outside Puerto Rico for purposes of promoting tourism, after approval by the Tourism Company of the text of any such advertisement, even if such advertisements circulate in Puerto Rico and are available to residents of the Island. Direct promotion and advertising by appellant Posadas of its gambling casino within the premises of the hotel which it operates in San Juan, where the casino is located, is also excluded from the restrictions, whether or not such promotion and advertising reaches residents of Puerto Rico. Finally, the Superior Court in its interpretation of the statute narrowed even more the restrictions by giving a long list of specific examples of the advertisements which appellant Posadas may legally publish or circulate in Puerto Rico. It is transparently clear, therefore, that the restrictions on advertising of appellant's casino are narrowly tailored to serve its goals.

### - III -

The restrictions imposed by Puerto Rico on the advertising of appellant's gambling casino do not violate the equal protection guarantee of either the Fifth or the Fourteenth Amendments. Advertising regulations relating to gambling casinos are a response to the particular problems presented by the legalization in 1948 of gambling casinos in Puerto Rico. Casino gambling had never been widely sponsored by the residents of Puerto Rico, as the Superior Court indicated in its opinion. Until that time the potential social, political and economic harms related to casino gambling were considered so serious and threatening that casino gambling was outlawed by the Puerto Rico Penal Code. To develop tourism which is critical to the economy of

Puerto Rico and to provide pressingly needed additional revenues to the government, the Legislature decided in 1948 (1) to legalize casino gambling as an experiment and under very strict measures of control, and (2) to prevent the artificial stimulation of demand for casino gambling among residents of the Island.

No advertising restrictions are imposed in Puerto Rico upon other authorized games of chance: horseracing, cock-fighting, the state-operated lottery, and small betting games which have always been traditionally part of the Puerto Rican's roots. Thus, the circumstances surrounding the legalization of other games of chance in Puerto Rico are not comparable to those involved in the legalization of casino gambling. Appellant did not attempt to show that any of the potential harms following casino gambling are present when other types of games like horseracing, cock-fighting, small betting and state lotteries are involved. The legislative classification does not invidiously and purposefully discriminate against a class entitled to protection in these circumstances. The fact that appellant Posadas, who owns a gambling casino, cannot freely hawk its wares to the public of Puerto Rico undoubtedly puts him at a disadvantage compared with those who own or operate facilities for other games like horseracing and cockfighting which are under no advertising restriction. But under equal protection principles this fact only gives rise to minimal scrutiny of the classification. Here the classification as to advertising adopted by the Legislature is valid since it is not wholly irrelevant to the achievement of Puerto Rico's objective.

### - IV -

The restrictions imposed on the advertising of appellant's gambling casino do not violate the Due Process Clause of either the Fifth or the Fourteenth Amendments. The restrictions are not invalid under the overbreadth doctrine because only commercial speech interests are implicated in this case. It is well-established that the overbreadth

doctrine rule does not apply to commercial speech. On the other hand, the Puerto Rico statute, as construed by the Superior Court, cannot be challenged as unduly vague, in violation of due process. Precise, specific and detailed guidelines as to what constitutes advertising of gambling casinos and offering their facilities to the public of Puerto Rico were established by the Superior Court which must be read as though they were written into the statute itself. These guidelines fully meet the required degree of clarity needed to give a person of ordinary intelligence fair notice of what is prohibited, and also provide fair enforcement standards to prevent arbitrary and discriminatory enforcement.

### ARGUMENT

#### **I. Advertising Of Casinos In Puerto Rico To Promote Gambling Is Not Protected By The First And The Fourteenth Amendments To The Constitution Of The United States.**

The Puerto Rico Games of Chance Act ("Act") authorizes games of roulette, dice, cards, slot-machines and bingo in casinos which operate under a license or franchise granted by the Commonwealth Government. 15 L.P.R.A. §§ 71 to 79a. Stringent limitations and conditions upon the granting of casino gambling licenses are imposed. Only the Secretary of the Treasury of Puerto Rico, with the previous approval of the Tourism Company, is authorized to issue gambling licenses provided the applicant fully complies with all of the strict requirements of the Act and the regulations prescribed thereunder. Such regulations are subject to the approval of the Governor of Puerto Rico and must be submitted to the Legislature before they become effective. A rigorous investigation of each applicant is prescribed by the statute and the regulations, and conducted as to applicant before any gambling license is granted. *Ibid.*; 15 R.R.P.R. §§ 76-1 to 76-22 and 76-201 to 76-216.

No transfer, assignment or cession of any share of or interest in the gambling license may be carried out without having previously obtained the written approval of the Tourism Company and the Secretary of the Treasury. The license must be renewed every ninety (90) days. 15 L.P.R.A. § 75 (Supp. 1984); 15 R.R.P.R. § 76-212. Any violation of the provisions of the statute or the regulations entails the cancellation of the gambling license.

Broad regulatory authority over the gambling casinos is given to the Tourism Company of Puerto Rico ("the Company"), which is a public corporation and instrumentality of the Commonwealth of Puerto Rico. 23 L.P.R.A. §§ 671 to 671t. The Company is empowered and directed by the Act to supervise and exercise surveillance of the games played in the casinos; to enforce all of the provisions of the Act, and of its regulations; to establish regulations governing the various casino games; to regulate all operations carried out in the gambling rooms; and to establish the requirements which must be met by all persons engaged in any activity connected with the operation of the gambling casinos. All casino employees are subject to licensing requirements, including without limitation croupiers, cashiers and managers. Company inspectors supervise the gambling devices, procedures and operations in each of the licensed casinos and are charged with strictly enforcing all of the provisions of the Act and its regulations. Hours during which the casino may be opened are limited by regulations which also proscribe the serving of alcoholic beverages within the casino, prohibit live entertainment on the casino premises and restrict the tipping of employees at the gambling tables. The minimum and maximum amounts for bets in each of the authorized games are subject to specific limitations. The equipment, devices and procedures to be used for each of the authorized games, such as craps, dice, roulette, baccarat, and chemin-de-fer, are specifically prescribed in the gambling regulations. 15 R.R.P.R. §§ 76a-31 to 76a-70, as amended. All of these restrictions and limitations, as well as the restrictions on advertising or offering

the casino facilities to the public in Puerto Rico, add up to a strong policy against wide-open gambling, unlimited gambling profits, and the stimulation of interest in and demand for casino gambling.

Before casino gambling in Puerto Rico was legalized in 1948, Articles 299 to 304 of the Penal Code prohibited all such gambling. 33 L.P.R.A. § 1241-1246. The legalization of casino gambling was undertaken by the Legislature of Puerto Rico under very severe measures of control. Extreme precautions were taken to avoid the Nevada and other similar experiences.<sup>7</sup> The 1948 Act and its regulations were designed to discourage residents of Puerto Rico from excessive gambling in the licensed casinos and to prevent the stimulation of demand for casino gambling. To protect the health, safety, and general welfare of the citizens of Puerto Rico, and yet make casino gambling economically successful by drawing tourists as its main customers, advertising of casinos to the public of Puerto Rico is restricted and such advertising addressed to tourists is permitted subject to prior editing and approval by the Tourism Com-

<sup>7</sup> See *The Development of the Law of Gambling, 1776-1976*, National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, 402-467 (1977); J. H. Skolnick, *House of Cards, The Legalization and Control of Casino Gambling*, 111-133 (1978); Schaeffer, *Control of Gaming in Nevada: A Look at Licensing*, 16 Calif. West. L. Rev. 500 (1980); *Gambling in America—Final Report of the Commission on the Review of the National Policy Towards Gambling*, 77-99 (Wash. 1976); *Easy Money—Report of the Task Force on Legalized Gambling*, 61-80 (1976); *Organized Crime—Report of the Task Force on Organized Crime*, National Advisory Committee on Criminal Justice Standards and Goals, 14-15, 23-33, 65-72, 216-248 (1976); *Use of Casinos to Launder Proceeds of Drug Trafficking and Organized Crime*, Hearings before the Subcommittee on Crime, Committee on the Judiciary, H.R. (1985); and *Gambling: Views from the Social Sciences*, The Annals of the American Academy of Political and Social Science, Vol. 474 (1984). On the social, political and economic costs of the legalization of gambling by New Jersey in Atlantic City, Sternlieb and Hughes, *The Atlantic City Gamble* (Harvard Univ. Press, 1983), at 9-13, 123-171. See also the article on the recent criminal activities of organized crime in gambling casinos in Las Vegas, in "The New York Times", January 22, 1986, page A-13.

pany. Casino facilities in Puerto Rico are addressed mainly to tourists, but also satisfy an unstimulated demand for gaming among residents which might otherwise seek an illegal outlet. Thus, the restrictions on casino advertising prevent or reduce the promotion and artificial stimulation of demand for casino gambling among the resident population. Advertising addressed to tourists is allowed both inside and outside of Puerto Rico subject to the prior editing and approval by the Tourism Company of the text of advertisements.

As interpreted by the Superior Court, the Act and its regulations only restrict advertising by appellant Posadas in the local publicity media to invite residents of Puerto Rico to visit its casino, but allow advertising "within the jurisdiction of Puerto Rico, addressed to tourists, . . . provided [advertisements] do not invite the residents of Puerto Rico to visit the casino, even though said advertisements may incidentally reach the hands of a resident." J.A. 112a. Moreover, any advertising by appellant Posadas of its casino in newspapers, magazines, movies, radio and television published for tourism promotion outside Puerto Rico, even if it circulates and is available to residents of the Island, is freely allowed. The direct promotion by Posadas of its casino within the premises of the hotel it operates, is also excluded from the prohibition and freely allowed, whether or not it reaches residents of Puerto Rico. Finally, as interpreted by the Superior Court, no legal restriction on advertising the appellant's casino exists if "... the object of the advertisement is the tourist [and not the resident of Puerto Rico]." J.S. Appendix B. 40b.

Appellant's contention that Puerto Rico "completely bans a casino franchise holder from advertising or offering its casino facilities to the public of Puerto Rico" (Brief, at 26) is clearly unfounded. Considering all the exceptions and limitations with which the Superior Court surrounded the advertising restriction by casinos under Section 8 of the Act, one may wonder whether really there is any limit to the casino advertising which Posadas may legally publish

within the jurisdiction of Puerto Rico. Certainly no restriction exists as to advertising addressed to tourists in Puerto Rico. Moreover, even if appellant Posadas' advertising of its casino reaches the hands of residents of Puerto Rico, it is not prohibited or restricted by the statute provided (1) it is published to promote tourism, and (2) its "object is the tourist" and not the resident. *Ibid.*, 40b.

The statutory restrictions on advertising casinos as interpreted by the Superior Court, only reach commercial speech, that is, mere "... proposals to engage in commercial transactions." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). Appellant Posadas mistakenly alleges that the Puerto Rico statute restricts "... valid speech interests that transcend protected commercial speech rights, as was dramatically evidenced by the penal fine imposed on Posadas for publicly debating an issue of general public concern." Brief, at 45. The record shows, however, that an administrative fine was imposed only because photographs were taken at the casino showing Posadas' General Manager in front of a row of slot machines during the mock funeral and said photographs were published in a San Juan newspaper article. J.S. Appendix B, 18b, 19b, 21b, J.A. 56. Such publication constitutes commercial speech despite the fact that Posadas criticized the Government's plan to remove the slot machines from its casino. This Court has made clear that "... advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech" and that "[a] company has the full panoply of protections available to its direct comments on public issues, so that there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Bolger v. Youngs Drug Products Corp.*, 463 U.S., at 68. See also *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 n.5 (1980). Moreover, Puerto Rico has placed no general restriction on appellant Posadas' right to publish facts or express opinions regarding public policy controversies or

issues relating to slot-machines or other gambling in its casino. The statute and the regulations prevent him only from conveying those facts and opinions in the form of an advertisement of his casino. Cf. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. —, 105 S.Ct. 2265, 2275 n.7 (1985).

Appellant Posadas ignores the Superior Court's limiting interpretation of the statutory and regulatory restrictions on advertising. It characterizes the prohibition as a total and complete ban on advertising or offering Posadas' casino facilities to the public of Puerto Rico, including tourists who visit the Island. Brief, at 26, 38, 40. This approach is based on appellant's view that the Superior Court construction should be rejected ("struck down") because it amounts to "[an exercise] of legislative functions to save the law from conflict with constitutional limitations." Brief, at 17. Such contention is without merit. Where the validity of a state (or Puerto Rico) statute has been sustained in the face of federal constitutional objections, this Court on review accepts the construction of the statute given by the state (or Puerto Rico) court, and proceeds to test its validity on that basis. In other words, the limiting construction of the Puerto Rico statute that has been placed upon it by the Superior Court will be read as though it were written into the statute itself. See, e.g., *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982); *Poulos v. New Hampshire*, 345 U.S. 395, 402 (1953); and *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933).

Our initial contention in this case is that promotion or advertising of appellant's gambling casino is not protected by the First or the Fourteenth Amendments to the Federal Constitution.<sup>8</sup> It is now well-settled (1) that "The protec-

<sup>8</sup> The Free Speech Clause of the First Amendment is applicable to Puerto Rico either directly or by operation of the Fourteenth Amendment. See *Torres v. Puerto Rico*, 442 U.S. 465, 469-470 (1979), and *Rivera Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 7-8 (1982).

tion available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980); and (2) that speech merely proposing a commercial transaction occurs in an area "traditionally subject to government regulation" and therefore is entitled to less extensive protection than that accorded to noncommercial speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64 (1983). In addition, this Court has ruled that (1) the constitutional protection afforded commercial speech, while substantial, does not bar regulation of commercial speech based on its content; (2) the overbreadth doctrine is not applicable to commercial speech; (3) commercial advertising may be conditioned upon providing reasonable additional information, warnings and disclaimers; and (4) prescreening of commercial advertising as to form and content is permitted because the prior restraint doctrine does not apply to commercial speech. See *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265, 2282 (1985); *Bolger v. Jones Drug Products Corp.*, 463 U.S. 60, 64-65 (1983); *In Re R.M.J.*, 455 U.S. 191, 199 n.11, 201-203, 206 (1982); and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 n.6, 565 n.8, 571 n.13 (1980). Entire classes of commercial speech have also been excluded from constitutional protection: commercial advertisements that are false, deceptive, or misleading or that propose an illegal transaction, do not come within the First Amendment. See *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct., at 2275; *Bolger v. Jones Drug Products Corp.*, 463 U.S., at 69; *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S., at 563-564, 566; and *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388 (1973).

The Puerto Rico restriction of casino advertising touches upon a class or category of commercial speech that has

never been specifically considered by this Court.<sup>9</sup> Casino gambling is an activity or business that can have serious harmful effects on the health, safety and welfare of the Puerto Rican society. Undoubtedly, it could be declared illegal and prohibited outright by the Commonwealth. In fact, until 1948 the potential social, political and economic harms related to casino gambling, such as the increase in local crime, the fostering of prostitution and corruption, the infiltration of organized crime, the cost of law enforcement, the disruption of moral and cultural patterns, and the danger that lower income groups would spend a great percentage of their income in gambling, were considered sufficiently serious and threatening to make casino gambling illegal in

<sup>9</sup> Comparable situations have arisen in cases involving the validity under the First Amendment of state bans on liquor advertising. See *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio S.T. 2d 361, 433 N.E.2d 183, appeal dismissed, 103 S.Ct. 31 (1982) (Ohio regulation that required liquor permit holders not to advertise the price per bottle of any alcoholic beverage, or in any manner referred to price or price advantage except within the premises and in a manner not visible from the outside does not violate the First Amendment); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983), cert. denied 104 S.Ct. 3553 (1984) (Miss. ban on liquor advertising by local, in-state media does not violate the First Amendment); *Oklahoma Telecaster Association v. Crisp*, 699 F.2d 490 (10th Cir. 1983) (Oklahoma's ban on the advertising of alcoholic beverages does not violate the First Amendment), reversed on other grounds *sub nom. Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984); *Rhode Island Liquor Stores Assn. v. The Evening Call Pub. Co.*, 497 A.2d 331 (R.I. Sup. Ct. 1985) and *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. Sup.Ct. 1985) (Rhode Island statute that prohibits retail liquor licenses and media located in the state from advertising liquor price information does not violate the First Amendment. See Note, *The First Amendment and Legislative Bans on Liquor and Cigarette Advertisements*, 85 Col. L.Rev. 632 (1985). Closer to the factual situation involved in the present appeal are *Princess Sea Indus. v. Nevada*, 97 Nev. 434, 635 P.2d 281 (Nev. Sup. Co. 1981), cert. denied 456 U.S. 926 (1982) (state may constitutionally prohibit advertising of brothels even in Nevada counties where prostitution is legal; and *Republic Entertainment, Inc. v. Clark County Liquor and Gambling License Board*, 99 Nev. 811, 672 P.2d 634 (Nev. Sup. Ct. 1983) (prohibitions of advertising by unlicensed escorts and escort bureaus do not violate the First Amendment).

Puerto Rico. See 33 L.P.R.A. §§ 1241-1246. As an experiment and under very strict measures of control, the Puerto Rico Legislature decided in 1948 to legalize casino gambling in order to develop tourism which is critical to the Island's economy and to provide urgently needed additional revenues to the Commonwealth Government. It was necessary, however, in order to avoid or at least reduce the potential harms resulting from casino gambling, to discourage residents of Puerto Rico from excessive gambling in the casinos and to prevent the stimulation of demand for casino gambling in a densely populated country where low standards of living still prevail. For those reasons, advertising of casinos to the public of Puerto Rico is prohibited and advertising addressed to tourists is permitted subject to prior editing and approval by the Tourism Company.<sup>10</sup>

First Amendment protection should not be extended to advertising which promotes, stimulates or increases consumer demand for services or activities, like casino gambling, which the Legislature has legalized only upon strictly controlled conditions to avoid or at least reduce the potential harms resulting from them. This is consistent with the "limited measure of protection" afforded to commercial speech "commensurate with its subordinate position in the scale of First Amendment values," and with the rule that "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." See *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978) and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980).

<sup>10</sup> It is immaterial whether or not the asserted interests that the restrictions on advertising advance were those expressly enunciated by the Legislature in the statement of motives (Section 1) of the 1948 Games of Chance Act or subsequent amendments to that statute, such as Act No. 13 of June 26, 1980. Thus, we need not respond to appellant's argument that the policy of the Act was not to discourage games of chance. Brief, at 32-34. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 70-71 (1983) and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460 (1978).

Advertising of potentially harmful services or activities like casino gambling falls in an area traditionally subject to government regulation, and to very strict limitations due to the vice-prone nature of casino gambling. For practical and logical reasons, since the Legislature of Puerto Rico could outlaw casino gambling, it should also be able to outlaw advertisements designed to stimulate or increase artificially consumer demand for casino gambling. To prohibit casino gambling completely by making it illegal may reasonably be considered impossible or undesirable by the Puerto Rico Legislature. To legalize casino gambling while allowing casino owners to stimulate consumer demand for gambling may also seem unreasonable and unadvisable. Thus, advertising of gambling casinos should be excluded from First Amendment protection and the Legislature should be left free to regulate or to suppress such advertisements, just as it may prohibit advertising related to illegal behavior or to false, deceptive, or misleading sales techniques.

The values and interests at stake in this case are not of the same order as those discussed in the cases in which this Court has found it necessary to strike down government regulations or prohibitions of various forms of commercial speech. In all of them commercial advertisements worthy of protection, because of their value to the free flow of information necessary for the operation of the market, and for public decision making in a democracy, were involved. The value of such commercial information to the advertisers, the consumers and society in general was emphasized by this Court. The state interest in regulating commercial advertising was weighed in each of those cases against the speech value of different categories of commercial speech. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1982); *In Re R.M.J.*, 455 U.S. 191 (1982); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Bates v. State Bar of Arizona*,

433 U.S. 350 (1977); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The value of the gambling casino advertisements at issue in this appeal, if any, is *de minimis*. They relate to activities or services which have a great potential for harm and that have been legalized only under stringent governmental control. The casino owners have, of course, an economic motivation for advertising their gambling facilities. But the vendor's right to sell his wares is not a sufficient reason for granting constitutional protection to commercial speech. On the other hand, the value to individual consumers and to society in general of advertising to entice people to play roulette, craps, blackjack, dice, baccarat, chemin-de-fer and bingo at appellant's casino, is zero. Such advertisements provide no information of a commercial nature which could be considered necessary or even helpful for a free market economy or for public decision making in a democracy. In contrast, Puerto Rico's interest in regulating the increase or stimulation of demand for casino gambling is exceedingly great and overwhelmingly outweighs the speech interests, if any, at stake in this appeal. The balance of competing interests is so strikingly clear that the advertising of gambling casinos must be considered to be unprotected by the First Amendment. Cf. *New York v. Ferber*, 458 U.S. 747, 763-766 (1982) (the category of child pornography is unprotected by the First Amendment, like offensive speech and obscenity); *Princess Sea Indus. v. Nevada*, 97 Nev. 434, 635 P.2d 281 (Nev. Sup. Ct., 1981), cert. denied 456 U.S. 926 (1982) (state may constitutionally prohibit advertising of brothels even in counties where prostitution is legal); and *Republic Entertainment, Inc. v. Clark County Liquor and Gambling License Board*, 99 Nev. 811, 672 P.2d 634 (Nev. Sup. Ct., 1983) (prohibition of advertising by unlicensed escorts and escort bureaus do not violate the First Amendment).

## II. The Restrictions On The Advertising Of Appellant's Gambling Casino Directly Advance Substantial Governmental Interests And Are Not More Extensive Than Is Necessary To Serve Those Interests.

Even if advertising of gambling casinos in Puerto Rico is within the protection of the First Amendment, the restrictions here imposed are valid because they directly advance substantial governmental interests and are not more extensive than is necessary to serve those interests. See *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S., at 566; *Bolger v. Youngs Drug Products Corp.*, 463 U.S., at 68-69; and *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct., at 2275.

There can be no question that Puerto Rico asserts substantial interests: the restrictions on advertising of gambling casinos are designed to prevent artificial stimulation and increase of local demand for casino gambling which would otherwise result in excessive gambling by residents of Puerto Rico. Excessive casino gambling among local residents provoked by advertisements enticing them to use the casino facilities to play roulette, craps, blackjack, dice, baccarat, and other such games, unless prevented, would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime. All of these are undoubtedly substantial governmental goals. The fact the Puerto Rico allows advertising addressed to tourists, both inside and outside the Island, subject to prior editing and approval by the Tourism Company, does not alter the situation. Advertising addressed to tourists presents very different and less acute problems than advertising addressed to residents. At least the Puerto Rico Legislature may determine so. Cf. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508-510, 511 (1980).

The direct connection between promotion and advertising of gambling casinos and the demand for gambling in the

casinos is beyond dispute. Appellant Posadas would not contest the advertising restrictions and would not pursue this case so vigorously unless it firmly believed that promotion of its casino gambling facilities would increase the gaming activities and the betting that take place in its casino. The use of this common sense approach to establish the direct relation between a restriction of advertising and the state interest which it purports to serve has received the approval of this Court. See, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S., at 569; and *Metromedia, Inc. v. City of San Diego*, 453 U.S., at 509. By its very nature, advertising and promotion of the games, services and other facilities offered in the casinos stimulate artificially the interest in and demand for gambling. The inevitable result is excessive gambling by people who are attracted by those advertisements. The Puerto Rico Legislature accepted these common sense conclusions and acted on the belief that promotion through advertising brings about and is directly related to excessive gambling in casinos through an artificial stimulation of the demand for casino gambling. This is a manifestly reasonable legislative judgment that should be upheld by this Court. The evidence presented to the lower court in this case confirms the accuracy of the legislative judgment. The gaming director of the Tourism Company, Mr. Francisco Nolla, stated during the trial that only about 5% of the persons who play at the casinos are residents of Puerto Rico. J.S. Appendix B. 22b. This remarkably low percentage of participation can only be attributed to the restrictions on advertising of gambling casinos to the public of Puerto Rico, which are imposed by the Puerto Rico Games of Chance Act. Writings and studies on legalized casino gambling in Nevada, New Jersey and Great Britain, as well as the legislative judgments embodied in the English Gaming Act of 1968, indicate that restrictions on advertising of gambling casinos serve as a direct and effective means of avoiding an increase in the demand for gambling and of

preventing excessive wide-open gambling, as well as its ensuing social, political and economic harms.<sup>11</sup>

As indicated in *Gambling in America*, Final Report of the Commission on the Review of the National Policy Toward Gambling (1976), Nevada allows unlimited advertising of its gambling casinos (at 104). In its recommendations, the Commission proposed that "appropriate restrictions be employed to limit the participation of the local population in casino gambling." (At 102). The survey results of the Commission indicated that "the widespread availability of legal gambling particularly casinos generates measurably higher rates of participation by Nevada residents" (at 97); that "... gambling is much more regressively related to income in Nevada than in the United States as a whole ..." (at 98); and that "low income people [in Nevada] are more readily attracted to gambling than are the more wealthy members of the community" (at 98). The New Jersey Casino Control Act, codified in N.J. Stat. Ann. § 5:12 to 70(r) (West Supp. 1984) requires the Casino Control Commission to adopt regulations relating to advertising. Among other general criteria established by the Commission are the following: Advertising shall adhere to generally accepted standards of good taste, shall be directed to the nature and tone of the existing hospitality industry, shall not violate the obscenity statutes, shall be based upon fact, and shall not be false, deceptive or misleading in any manner. Ch. 51-19:51-1.2. In addition, as to advertising of casino gaming or casino gaming activity, the following prohibitions have been provided: No advertisement shall stress gaming as its dominant theme; nor divulge any information concerning the size of the casino, gambling odds available or the number of games at the casino, although the location

<sup>11</sup> This Court has often considered such social studies and legislative judgments to determine issues similar to the one relative to the link between advertising and demand for casino gambling. See, e.g., *Brown v. Board of Education of Topeka*, 347 U.S. 483, 494 n.11 (1954); *New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982); and *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 58 n.8 (1973).

of the casino, its hours of operation, amenities available or the types of games available may be advertised; no on-site advertising shall appear unless it contains the phrase "Bet with your head. Not over it." *Ibid.*, 19:51-1.3. The English Gaming Act of 1968 prohibits advertising of casinos within Great Britain, except advertisements relating to noncommercial gaming, advertisements of traveling showmen's pleasure fairs, and displays of gaming licenses or notices. Part IV, Sec. 42. See Eddy & Loewe, *The New Law of Gaming* (London, 1969), 120-199. These restrictions were adopted in accordance with the findings and recommendations of the Royal Commission on Gambling to the effect that (1) commercial gaming facilities be provided "... under appropriate supervision but only on the scale needed to meet the unstimulated demand for them," (2) restrictions be imposed "to discourage socially damaging excesses and to prevent the incursion of crime into gambling," (3) the "underlying principle is that casino facilities in Britain should be sufficient, but no more than sufficient, to satisfy an unstimulated demand for gaming which might otherwise seek an illegal outlet," (4) this "principle of satisfying unstimulated demand is the connecting thread which runs through the whole fabric of gaming control"; and (5) "the prohibition of advertising prevents the artificial stimulation of demand." *Royal Commission on Gambling, Final Report*, Vol. 2, pages 270, 272, 290, and 292. Advertising of casinos is permitted, however, outside of Great Britain. The English Act and its regulations prohibit liquor and live entertainment in the gambling casinos. Hours of operation are also limited. These and other restrictions are intended to prevent stimulation of demand for casino gambling among the local population in Great Britain. *Ibid.*, 290, 291. See also *Developments of the Law of Gambling: 1776-1976*, 402-467, 890-933 (1977).<sup>12</sup>

<sup>12</sup> As to writings and studies on the social, political and economic problems following legalization of casino gambling, see the references in footnote 7 of this Brief, especially Skolnick, *House of Cards* (1978); Sternlieb & Hughes, *The Atlantic City Gamble* (1983); and the articles included in *Gambling: Views from the Social Sciences*, *The Annals of the Ameri-*

Finally, it is clear that the advertising restrictions are not broader than necessary to serve the goal of preventing the artificial stimulation and promotion of casino gambling and its potential harms, as required by the fourth prong of the *Central Hudson* test. Puerto Rico does not impose a complete or absolute ban on advertising gambling casinos to the public of Puerto Rico. As construed by the Superior Court, advertising by appellant Posadas of its gambling casino in Puerto Rico is prohibited *only* when the advertisement is directed exclusively to enticing residents of Puerto Rico to visit the casino and to use its facilities. There is no restriction whatsoever on advertising the gambling casino if "... the object of the advertisement is the tourist [and not the resident of Puerto Rico]. Advertisements in Puerto Rico addressed to tourists are not prohibited even though they may incidentally reach the hands of residents. Additionally, appellant Posadas is free to advertise its casino outside of Puerto Rico for purposes of promoting tourism, in newspapers, magazines, movies, radio and television, and other publicity media after previous approval by the Tourism Company of the text of any such advertisement, even if it circulates in Puerto Rico and is available to residents of the Island. Also, direct promotion and advertising by Posadas of its casino within the premises of the hotel which it operates in San Juan, where the casino is located, is also excluded from the prohibition and freely permitted, whether or not such promotion and advertising reaches residents of Puerto Rico. J.S. Appendix B, 37b to 49b; J.A. 112a.

The Superior Court specifically lists, without limitation, some of the advertisements of Posadas' gambling casino which may legally be published or circulated in Puerto Rico: (1) advertisements distributed or placed "in landed airplanes or cruise ships in jurisdictional waters and in restricted areas to travelers in the International Airport and the docks where tourist cruise ships arrive ..." (*Ibid.*,

can Academy of Political and Social Science, Vol. 474, 12-22, 23-35, 48-60, 61-71, 72-79, 80-90, 107-121, 122-132, 133-145, 146-156 (1984).

112a, 39b); (2) advertisements in magazines, for distribution primarily in Puerto Rico to tourists, even though they may be available to residents; (3) advertisements in movies, television, radio, newspapers and trade magazines published outside Puerto Rico for tourism promotion, even though they may incidentally circulate in the Island, as for example an advertisement in "The New York Times" or in a CBS program which reaches Puerto Rico through Cable TV (*Ibid.*, 39b); (3) advertisements using the trade name of appellant's hotel with a reference to its gambling casino special vacation packages and activities at the hotel, in invitations, billboards, bulletins, programs, menus, napkins, glasses, glassware and other items used within the hotel, as well as in calling cards, envelopes and letterheads of the hotel (*Ibid.*, 39b); (4) the use of the trade name of the hotel with a reference to appellant's gambling casino in the hotel's facade provided the word casino does not exceed in proportion the size of the rest of the name, with proper utilization of lights and colors (*Ibid.*, 39b); (5) advertisements with any type of information and promotion regarding the location of appellant's casino, its schedule and games which are distributed within the hotel premises to in-house guests and clients. (*Ibid.*, 40b); and (6) advertisements distributed to in-house guests and clients within the hotel premises in the form of magazines, souvenirs, stirrers, matchboxes, cards, dice, chips, T-shirts, hats, photographs, postcards, and similar items used by tourism centers (*Ibid.*, 40b).

The restriction on advertising gambling casinos is, therefore, narrowly tailored to serve its goals of (1) preventing the artificial stimulation and increase in demand for casino gambling among residents of Puerto Rico; and (2) preventing the harms to Puerto Rican society which would result from excessive gambling in casinos by local residents. Considering the direct relation between advertising of gambling casinos and excessive and harmful gambling, the Puerto Rico Legislature had ample justification for enacting an outright advertising as the only effective way of

avoiding the problems which excessive and harmful gambling create.

No such prohibition, however, was imposed. Puerto Rico allows various types of casino advertisements of use to visitors and tourists, even though incidentally they may be available to residents. The only advertisements restricted are those directed exclusively to attracting residents of Puerto Rico to gamble in the casinos. The Legislature of Puerto Rico presumably believed that it could accomplish its ends of avoiding harmful and excessive gambling by residents if it restricted only direct advertising to them. In a closely analogous situation, this Court upheld the validity of a San Diego ordinance banning most billboard advertising, but allowing on-site commercial billboards and some other specifically exempted signs, to eliminate traffic hazards and to preserve and improve the appearance of the city. The constitutionality of the ban as applied to commercial billboard speech was scrutinized under the *Central Hudson* test. After holding that the government's interests in traffic safety and the appearance of the city were substantial, this Court decided that the San Diego ordinance reached no further than necessary to accomplish those objectives. The Court reasoned as follows: "Similarly, we reject appellants' claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the *Central Hudson* test. If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981).

The experience with legalized casino gambling in Nevada, New Jersey, Great Britain and Puerto Rico indicates that it is necessary to prohibit or restrict advertising of gam-

bling casinos in order to avoid harmful and excessive gambling by residents of the community where casinos are located. Puerto Rico has adopted limited restrictions. In England an almost outright prohibition exists. Other measures like limiting the hours of operation of casinos, prohibiting the sale of liquor, banning live entertainment in the gaming rooms, and fixing the minimum and maximum amounts for bets in each of the authorized games, are helpful but insufficient. Warnings like the phrase "Bet with your head. Not over it" required in New Jersey for onsite advertising of casino gambling cannot counteract the force of promotion and advertising of gambling casinos. It is obviously impracticable and almost impossible to prohibit residents of Puerto Rico to gamble in the casinos while allowing tourists to do so. The restrictions imposed by Puerto Rico on advertising of the gambling casinos go no further than necessary to accomplish the objective of avoiding excessive and harmful casino gambling by residents of the Island.

**III. The Restrictions Imposed By Puerto Rico On The Advertising Of Appellant's Gambling Casino Do Not Violate The Equal Protection Guarantee Of Either The Fifth Or The Fourteenth Amendments.**

Appellant Posadas maintains that the Puerto Rico advertising restrictions violate its equal protection rights in that no such restrictions are imposed on other games of chance, such as horse races, cockfights, and the lottery. The equal protection issue is included as one of the "questions presented" [Brief. i, 1(b)] and is discussed in the appellant's Brief, at pages 40-45. Appellant asks this Court to apply the strict scrutiny standard of review, relying on the fundamental rights strand of the equal protection doctrine.<sup>13</sup>

<sup>13</sup> The equal protection guarantee of either the Fifth or the Fourteenth Amendment is applicable to Puerto Rico. See *Examining Board v. Flores de Otero*, 426 U.S. 572, 599-601 (1976); and *Rivera-Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 7-8 (1982).

The advertising regulations relating to gambling casinos are a response to the particular problems presented by the legalization in 1948 of gambling casinos in Puerto Rico. Until that time the potential social, political and economic harms related to casino gambling which we have previously pointed out, were considered by the Legislature so serious and threatening that casino gambling was outlawed by the Puerto Rico Penal Code. See 33 L.P.R.A. §§ 1241-1246. To develop tourism which is critical to the economy of Puerto Rico and to provide pressingly needed additional revenues to the government, the Puerto Rico Legislature decided to legalize casino gambling in 1948 as an experiment and under very strict measures of control. Casino gambling had never been widely sponsored by the residents of Puerto Rico, as the Superior Court indicated in its opinion. J.S. Appendix B, 35b. The Legislature decided that it was necessary to prevent the creation or artificial stimulation of demand for casino gambling among residents of the Island to prevent excessive gambling and to avoid or at least reduce the potential harms resulting from such gambling. For those reasons, restrictions on advertising of casinos to the public of Puerto Rico were enacted and have been in effect during almost forty years.

The Superior Court concluded that the circumstances surrounding the legalization of other games of chance in Puerto Rico were not comparable: "Since cockfighting, horseracing, small betting games (picas) and the lottery have been traditionally part of the Puerto Rican's roots, the legislator could have been more flexible than in authorizing more sophisticated games which are not so widely sponsored by the people." J.S. Appendix B, 35b. Appellant did not attempt to show that the circumstances, problems and history of the legalization of cockfighting, horseracing, lotteries and small betting games were similar or comparable to those of the legalization of casino gambling. No attempt was made either to show that any of the potential harms following casino gambling are present when other

types of gambling like lotteries, horseracing or cockfights are involved.

Strict scrutiny of the classification is clearly inappropriate since the Puerto Rico restrictions on advertising of gambling casinos do not violate the First Amendment. Furthermore, commercial speech is entitled to only a limited measure of protection under a different standard of review. The state, under the *Central Hudson* test, must demonstrate only a substantial interest which is directly advanced by the regulation. If the right to advertise for profits were fundamental, parties subject to a commercial speech regulation could rely on a stricter standard of review—requiring a compelling state interest and necessary means chosen to attain it—by locating an unregulated class of advertisers and insisting on an equal protection analysis by this Court.

The economic interests of appellant Posadas who owns a gambling casino and cannot freely hawk its wares to the public of Puerto Rico undoubtedly are at a disadvantage compared with those who own or operate facilities for other games like horseracing and cockfighting which are under no advertising restrictions. But this fact only gives rise to an equal protection issue requiring minimal or differential scrutiny. Under such standard of review applicable to social and economic regulation, the classification challenged need only be rationally related to a legitimate state interest and there is no requirement that the state legislate more broadly than required by the problems it seeks to remedy. See, e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-196 (1983); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-179 (1980); *New Orleans v. Dukes*, 427 U.S. 297, 303-306 (1976); and *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488-489 (1955). Here Puerto Rico has reasonably chosen to restrict its advertising regulation to casino gambling and not to restrict advertising of other games. Such classification is valid since it is not “wholly irrelevant to the achievement of the State’s objective.” *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

#### IV. The Restrictions Imposed By Puerto Rico On The Advertising Of Appellant’s Gambling Casino Do Not Violate The Due Process Clause Of Either The Fifth Or The Fourteenth Amendments.

Appellant urges this Court to declare that the Puerto Rico advertising restrictions violate its due process rights under the Fifth and the Fourteenth Amendments “. . . due to the vagueness and overbreadth of the statute’s no-advertising provision . . .” Appellant’s Br., pp. i, 45-52. Its contentions are as follows: (1) the casino “advertising ban” not only infringes Posadas’ commercial freedom of speech rights but is also so “overly broad” in violation of the Due Process Clause that it restricts noncommercial speech. *Ibid.*, pp. 45, 46-49; (2) the statute “. . . contains no standards that give fair and adequate notice of the type of conduct prohibited, encouraging arbitrary enforcement, and subjecting the ‘offender’ to penal sanctions when sufficient definiteness—that ordinary people can understand—is totally lacking.” *Ibid.*, p. 45; and (3) the “. . . 23 words that make up the contested provision set no guidelines as to what constitutes ‘advertise or otherwise offer the facilities’ or who is considered ‘public’ ” (*Ibid.*, p. 49); and fail to afford “fair warning of what is proscribed” and to provide “. . . requirements . . . to govern law enforcement.” *Ibid.*, p. 50. We shall briefly address these arguments. They are obviously unfounded and meritless.

It is well-established that the overbreadth doctrine does not apply to commercial speech.<sup>14</sup> The chilling justification for the overbreadth principle is absent in the commercial speech context because, since “. . . advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad

<sup>14</sup> The rule of overbreadth is confined usually to the First Amendment area. It is doubtful whether it applies in the case of a due process challenge. Appellant’s argument seems to confuse vagueness and overbreadth. In any case, only commercial speech interests are implicated in the present case (i.e., speech which merely proposes a commercial transaction) to which the overbreadth doctrine is not applicable.

regulation"; and "... concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about the product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected." *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). See also *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 565 n.8 (1980); and *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

Appellant mistakenly alleges that the Puerto Rico advertising restrictions are "... so overly broad and vague as to restrict valid speech interests that transcend protected commercial speech rights, as was dramatically evidenced by the penal fine imposed on Posadas for publicly debating an issue of general public concern." Appellant's Br., p. 45. As we have shown, there is no basis for this contention. Posadas was fined only because photographs taken at its casino, showing its general manager in front of a row of slot machines during a mock funeral, were published in a San Juan newspaper. J.S. Appendix B, 18b, 19b, 21b; J.A. 56. Such publication constitutes commercial speech despite the fact that Posadas linked its advertisement to a criticism of the government's policy of reducing the number of slot machines in gambling casinos in Puerto Rico. Furthermore, no general restriction is placed by the Puerto Rico statute, as construed by the Superior Court, on anyone's right to publish facts and express opinions regarding public policies or issues which touch upon slot machines or other gambling casino activities. The statute only prevents the conveyance of those facts and opinions in the form of an advertisement of a gambling casino. Cf. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265, 2275 n.7 (1985).

The Puerto Rico statute, as construed by the Superior Court, cannot be challenged as unduly vague, in violation of due process. Precise, specific and detailed guidelines as

to what constitutes advertising of gambling casinos and offering their facilities to the public of Puerto Rico were established by the Superior Court which must be read as though they were written into the statute itself. These guidelines fully meet the required degree of clarity needed to give a person of ordinary intelligence fair notice of what is prohibited, and also provide fair enforcement standards to prevent arbitrary and discriminatory enforcement. Even under the relatively strict test appropriate to an enactment which, as here, has both civil and criminal penalties, the Superior Court's interpretation of the advertising restrictions is sufficiently specific and precise. It not only establishes detailed guidelines with a high degree of specificity and preciseness, but also clarifies them by a long list of illustrations as to which advertisements are prohibited and which advertisements are allowed. As we have shown, the Puerto Rico restrictions on advertising of appellant's gambling casinos do not reach Posadas' constitutionally protected commercial speech rights under the *Central Hudson* test. The degree of clarity of the restrictions imposed is sufficient also not to chill the exercise by Posadas of its constitutionally protected noncommercial free speech rights. Indeed, Posadas, as a regulated enterprise under the Puerto Rico statute, has the ability to clarify the meaning of the restrictions by its own inquiry or by resort to an administrative process. Cf. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

There is really no defect of clarity in the advertising restrictions as construed by the Superior Court. Appellant pointed out none, but only challenges the vagueness of the statutory enactment, as it appeared before it was construed by the Superior Court. Its challenge is based, as we have indicated, on the contention that the "... 23 words that make up the contested provision set no guidelines as to what constitutes 'advertise or otherwise offer the facilities' or who is considered 'public'." Appellant's Br., p. 49. This approach is fallacious. It is based on appellant's erroneous view that the Superior Court's construction of the adver-

tising restrictions should be rejected by this Court because it amounts to "[an exercise] of legislative functions to save the law from conflict with constitutional limitations." Appellant's Br., p. 17. But, as we have shown, where the validity of a state (or Puerto Rico) statute has been sustained in the face of federal constitutional objections, this Court on review accepts the construction of the statute given by the state (or Puerto Rico) court and proceeds to test its validity on that basis. See, e.g., *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982); and *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982).

### CONCLUSION

We respectfully submit that the restrictions on the advertising of Appellant's gambling casino imposed by Section 8 of Act 221 of May 15, 1948, as construed by the Superior Court of Puerto Rico, are valid under the provisions of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and that this Court should affirm the judgment of the Supreme Court of the Commonwealth of Puerto Rico.

Respectfully submitted,

HECTOR RIVERA CRUZ  
Secretary of Justice  
Commonwealth of Puerto Rico

RAFAEL ORTIZ CARRION  
Solicitor General  
Commonwealth of Puerto Rico

LINO J. SALDAÑA  
(*Counsel of Record*)  
SALDAÑA, REY, MORAN & ALVARADO  
P. O. Box 13954  
Santurce, Puerto Rico 00908  
Tel. (309) 721-6345

*Attorneys for Appellees*

February 15, 1986

## **APPENDICES**

**APPENDIX A**

**COMMONWEALTH OF PUERTO RICO  
SUPREME COURT  
OFFICE OF THE SECRETARY  
San Juan, Puerto Rico**

**CHIEF CLERK'S CERTIFICATE**

I, Heriberto Pérez Ruiz, Acting Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the Notice of Appeal in *Posadas de Puerto Rico Associates D/B/A Condado Holiday Inn v. Puerto Rico Tourism Company*, Case No. O-85-14, was filed with the Office of the Clerk of this Court on January 14, 1985, at 5:06 p. m.

IN WITNESS WHEREOF, and at the request of the interested party, I issue these presents under my hand and the seal of this Court in San Juan, Puerto Rico, this 14th day of January, 1986.

/s/ HERIBERTO PÉREZ RUIZ  
Heriberto Pérez Ruiz  
Acting Chief Clerk  
Supreme Court of Puerto Rico

[SEAL]

## APPENDIX B

(Translation)

## IN THE SUPREME COURT OF PUERTO RICO

No. R-78-211

Review

Tim Manufacturing Co.,

Plaintiff and appellee

v.

Shelley Enterprises, Inc.,

Hampton Development Corp. of P.R.,

Urban Renewal and Housing Corporation,

National Insurance Company,

Defendants and appellants  
the second and the latter

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico, September 12, 1978

On May 3, 1978 the trial court rendered judgment, filed in the record and notified on the 5th day of that same month, finding for Tim Manufacturing Co. in an action for collection of money, and ordering the defendant constructor, Hampton Development Co., and its surety company, National Insurance Co., to pay plaintiff \$116,577.86, interest at the annual rate of 8% from January 31, 1974—date when the cause of action arose (Rule 44.4)—, costs, and \$20,000.00 for attorney's fees; and setting aside Hampton's counterclaim. On June 5, 1978, last working day given by the court to appeal on review, at 8:20 p.m., defendant Hampton's counsel delivered at the residence of the Deputy Clerk of this Court the petition for review. Instead of the filing seal of the time watch, the following note was handwritten on it:

Received by Mr. Miguel Mercado, Deputy Clerk of the Supreme Court, this 5th day of June 1978, at 8:20 p.m.

Appellee Tim Manufacturing Company, petitioned for dismissal on the Court's want of jurisdiction, based on the premise that said petition did not reach the Office of the Clerk of this Court until a day after it was delivered to the Deputy Clerk, that is, after the 30-day term prescribed by Rule 53.1(b) had expired. In support of its position it cites our decision in *American Colonial Bank v. Ramos*, 33 P.R.R. 851 (1924). This motion to dismiss was notified to appellant on June 14, 1978, and there has been no opposition to the same.<sup>1</sup>

[1-3] The right to seek review before the Supreme Court is a procedural transaction which is perfected by filing the petition with the Office of the Clerk. The procedure is set forth in Rule 53.1(b) of the Rules of Civil Procedure: "A review is perfected by filing a petition with the Clerk of the Supreme Court within thirty (30) days after the entry of a copy of the notice of judgment rendered by the Superior Court. The Clerk of the Supreme Court shall transmit a copy of such petition to the Clerk of the part of the Superior Court that rendered the judgment object of the petition." Practice has shown that this 30-day term is reasonable and sufficient for the technical and legal preparation of the petition, as well as for the organization and collection of all the documents required. Said term becomes pressing only when the appellant does not use the first 20 days. Hence, these last minute rushes leading to irregular filings are appellant's fault and they have nothing to do

<sup>1</sup> On July 12, 1978 appellant National Insurance Company voluntarily dismissed its appeal because it was untimely and on August 4, 1978, it filed it again as an "amended petition" under a separate record, No. R-78-293.

with the insufficiency of the term. This is the reason for maintaining that the thirtieth or last working day provided to file with the Office of the Clerk a petition for review, ends at 5:00 p.m., time at which, pursuant to Rule 8(a) of the Rules of the Court, said office closes.

[4] The modification introduced to the Rules of the Court, adopted in 1974, regarding the working hours of the Court, elaborates on the sufficiency of the term. Rule 5(1)(a) of the Rules of the Court ((of 1961) 82 P.R.R. 1101) provided that the Clerk "shall keep his office open to the public from 8:30 a.m. until 12 o'clock noon, and from 1:00 until 5 o'clock p.m., but the Court shall always be considered *open* for the purpose of *filing* any pleading or document or of issuing any order." (Underscore [italic] supplied.) When the correlative Rule 8(a) was approved in 1975 the phrase regarding the filing after working hours was deleted even though it kept the statement that "the Court shall always be considered open for the purpose of issuing any order." The time limit to file with the Office of the Clerk was reaffirmed by the present Rule 48(a) of the Rules of the Court through its warning to the effect that "[w]henever pursuant to these rules or by order of the Court, papers must be filed with the Court within a specific period of time, or on a certain day, the term shall expire at 5:00 p.m. of the corresponding day." The 30-day jurisdictional term to file a petition for review must be understood in harmony with the working day of the employees of the Office of the Clerk. Nobody has ever suggested, as it would be absurd to suggest, that we establish a permanent personnel shift from 5:00 p.m. until midnight of the last day of the term, in order to protect those late-comers who make their filings during those irregular hours. Even the constitutional right to a speedy trial is sometimes adapted to the working schedule and to practical realities within the system of justice administration. *Hernández Pacheco v. Flores Rodríguez*, 105 D.P.R. 173 (1976).

[5-7] The requirement<sup>2</sup> of Rule 53.1(b) to the effect that "[a] review is perfected by filing a petition with the Secretary of the Supreme Court", which excludes any other place or method, is an essential part of the guarantees of certainty, rectitude, and security which must surround all judicial proceedings so as to maintain the *faith in justice* that the Preamble of our Constitution proclaims as determinant factor in our lives. When documents are delivered to officers or employees outside the Office of the Clerk, the prescribed legal course is upset, adding fuel to and prolonging the litigation with a dispute as to the correction of what has been done; it involves the person who kindly received the papers after office hours, obliging him to constantly ratify his honesty and integrity, thus unfairly eroding his dignity; it also exposes the document to risks which may never occur at the Office of the Clerk;<sup>3</sup> and, finally, without no other benefit than the satisfaction of a tardy litigant, injects in the proceeding for review elements of insecurity, lack of certainty and reliability, all of which are repugnant to the legality of the judicial process.

In *American Colonial Bank v. Ramos, supra*, we held that the filing of the notice of appeal with the clerk of the court at his private residence at 10:00 p.m., did not have the effect of a filing, and that the delivery acquired the effect of a filing when, on the following day, the clerk

<sup>2</sup> It was reinstated in Rule 17(a) of the Rules in force.

<sup>3</sup> The exclusive filing of the documents with the Office of the Clerk as a way to avoid errors, is a rule sustained by the U.S. case law. The delivery to an officer outside the office of the Clerk does not have the effect of a filing. *Richmond v. Shipman*, 63 Cal. App. 3d 340; 133 Cal. Rptr. 742; *Edwards v. Grand*, 121 Cal. 254; 53 P. 796; *In re Norton*, 53 N.Y.S. 924; *Brelsford v. Com. H.S. Dist.*, 328 Ill. 27; 159 N.E. 237; *People v. Slobodion*, 3 Cal. 2d 362; 181 P.2d 868; *Gietl v. Com. of Drainage*, 51 N.E.2d 512; *Hutchins v. County Clerk*, 140 Cal. App. 348, 35 P.2d 563.

filed the notice at his office, and the term fixed by law to appeal had already expired. This decision is particularly applicable to the case at bar because, although less strictly than the prevailing Rule 53.1(b) of the Rules of Civil Procedure, the article construed therein was art. 296 of the Code of Civil Procedure which ordered: "An appeal is taken by filing with the secretary of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney."

It seems that the doctrine laid down in *American Colonial Bank, supra*, somehow got lost with the lapse of time giving rise to the practice of filing at the last minute, after the Office of the Clerk was closed, delivering the papers to the officer in this case or to another officer or employee outside the Office of the Clerk. Said practice must necessarily come to a stop, but not at the expense of sacrificing the petition for review in this case for lack of jurisdiction, which followed the tendency that had been overlooked until today; hence, the case law set down herein shall only have a prospective effect.

Appellee's motion to dismiss for lack of jurisdiction will be *denied*.

Mr. Chief Justice Trías Monge concurs in the result without an opinion.

# CHIEF CLERK'S CERTIFICATE

I, Heriberto Pérez Ruiz, Acting Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on September 12, 1978, in case No. R-78-211, *Tim Manufacturing Co. v. Shelley Enterprises, Inc.*, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 5th day of February 1986.

[STAMPS, SEALS]

/s/ HERIBERTO PÉREZ RUIZ  
Heriberto Pérez Ruiz  
Acting Chief Clerk  
Supreme Court of Puerto Rico

[SEAL]

## APPENDIX C

(Translation)

## IN THE SUPREME COURT OF PUERTO RICO

M-80-1

Violation of Art. 255 of the Penal Code  
(Perjury)

The People of Puerto Rico,  
Appellee

v.

Roberto Fragoso Sierra,  
Defendant-appellant

San Juan, Puerto Rico, March 31, 1980

PER CURIAM: On July 2, 1979—following a trial by jury—the defendant was sentenced to serve from seven to ten years imprisonment. This sentence was later reduced to a four to ten year term.

On July 10, 1979, the defendant filed a notice of appeal before the trial court. The Supreme Court was not notified of this notice until January 4, 1980.

The prosecution filed a motion seeking dismissal of the appeal on the grounds that it did not comply with the provisions of the second paragraph of Rule 194 of the Rules of Criminal Procedure to the effect that every notice of appeal shall be perfected as follows:

The appellant shall file with or remit a copy of the bill [*sic*] of appeal by registered mail to the Office of the Court Clerk within forty eight (48) hours following the filing of the bill [*sic*] at the trial court, and shall notify the prosecuting attorney of the bill [*sic*] of appeal within the term to appeal. Such notice to the prosecuting attorney shall be made in the manner

prescribed in these rules, except as otherwise provided in the following rule.

The prosecution maintains that the 48-hour term provided in the aforecopied paragraph of the Rule is of a jurisdictional nature.

The provision at issue was added by virtue of Act No. 77 of June 23, 1978. This amendment to Rule 194 was recommended by this Court. In a letter, dated March 14, 1978—to the President of the Senate—we requested that said measure be presented, expressing the desirability “that when an appeal is filed, a copy of the notice of appeal be filed with the Clerk of the appellate court, so that the Court is immediately informed of the appeal and can assume its supervisory jurisdiction.” It stated further on that:

That the Supreme Court en banc deems that this measure is essential to provide the continuous supervisory control necessary with regard to all appeals filed before appellate courts.

Included in the letter was a draft bill that, with minor changes, was converted into law.

[1] In the Statement of Motives of this draft as well as in the cited law derived thereof, the aim of said measure was reiterated:

The Appellate Courts should exercise continuous supervision over the remedies of appeal filed before them. Control of appellate proceedings should be initiated at the same time that the notice of appeal is filed. This is why it is necessary that a copy of the bill [*sic*] of appeal be filed with the Office of the Clerk of Appellate Court, so that he may know immediately of the existence of the remedy and may thus assume his supervising jurisdiction.\*

[\*Translator's Note: Copied from Laws of Puerto Rico, 1978 at 253.]

The rationale behind this action was clearly to permit the court to take the necessary steps to properly speed up the appellate proceedings which were often delayed by an absence of control which could defeat the ends of justice.<sup>1</sup> The purpose of the law was not to raise further judicial barriers. The aim was to establish a norm of strict compliance in order to strengthen the supervisory function of the appellate courts. The debate on the bill also shows that the 48-hour term was not jurisdictional. On May 2, 1978, the following exchange took place in the House of Representatives:

MR. VICE-PRESIDENT: Mr. Representative Santiago Garcia.

MR. SANTIAGO GARCIA: To see if my colleague Martínez Colón can answer two or three questions about this project.

MR. VICE-PRESIDENT: I am going to ask our colleague—he will make them, but—he should address the President so that it be known.

MR. SANTIAGO GARCIA: Of course.

MR. VICE-PRESIDENT: Is colleague Martínez Colón willing to answer them?

MR. MARTINEZ COLON: Yes.

MR. VICE-PRESIDENT: Proceed.

MR. SANTIAGO GARCIA: Mr. Martínez Colón, concerning the forty-eight (48) hour term provided for in this measure for the filing or sending by certified mail of a copy of the notice of appeal to the Appellate Court; this term, is it jurisdictional or is it merely directive?

<sup>1</sup> This practice is recommended in several studies. See: A.B.A. Commission on Standards of Judicial Administration, *Standards Relating to Appellate Courts*, 31, standard 3.13(4)(b), (1977).

MR. MARTINEZ COLON: It is not jurisdictional.

MR. SANTIAGO GARCIA: Is it a period of limitation or is it directive?

MR. MARTINEZ COLON: It is directive.

MR. SANTIAGO GARCIA: Does it mean then that even though it should be complied with by all persons or lawyers that file appeals, if for any reason of weight this term was not complied with, the Appellate Court does not lose its jurisdiction?

MR. MARTINEZ COLON: That is so.<sup>2</sup>

[2] In view of the foregoing, we resolve that the 48-hour term, referred to in the second paragraph of Rule 194 of the Rules of Criminal Procedure, is not of a jurisdictional nature, but should be strictly complied with. Notice the reference made in the Statement of Motives regarding the need of the clerk of the appellate court "so that he may know *immediately* of the existence of the remedy." (Under-score [italic] supplied.) No deviation from said 48-hour term will be permitted, under penalty of dismissing the appeal, unless the delay is fully justified in detail. Otherwise, the supervisory function of this Court would be seriously curtailed and the mandate of the second paragraph of Rule 194 of the Rules of Criminal Procedure would be reduced to a mere warning.

In the case at bar there was a five month delay. It has not been justified and probably under no circumstances could such an extraordinary delay be justified.

*The motion seeking reconsideration filed by appellant of the resolution issued on January 17, 1980, dismissing the appeal is hereby denied.*

<sup>2</sup> *Diario de Sesiones*—House of Representatives, typewritten pp. 44-46.

**CHIEF CLERK'S CERTIFICATE**

I, Heriberto Pérez Ruiz, Acting Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on March 31, 1980, in case No. M-80-1, *People v. Fragoso Sierra*, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 5th day of February 1986.

[STAMPS, SEALS]

/s/ HERIBERTO PÉREZ RUIZ  
Heriberto Pérez Ruiz  
Acting Chief Clerk  
Supreme Court of Puerto Rico

[SEAL]

**APPENDIX D**

(Translation)

IN THE SUPERIOR COURT OF PUERTO RICO  
SAN JUAN PART

**Civil No. 82-1508 (908)**

Re: Declaratory Judgment

POSADAS DE PUERTO RICO ASSOCIATION

D/B/A CONDADO HOLIDAY INN

Plaintiff-Appellant

v.

PUERTO RICO TOURISM COMPANY

Defendant-Appellee

**APPEAL TO THE SUPREME COURT  
OF PUERTO RICO**

*TO THE HONORABLE COURT:*

Comes now the Plaintiff-Appellant, through its undersigned attorney, and pursuant to the applicable provisions of the Rules of Civil Procedure, perfects, within the legal term, its appeal before the Honorable Supreme Court of Puerto Rico, from the Declaratory Judgment rendered by this Honorable Court on December 12, 1984, entered in the record on December 14, 1984.

**Jurisdiction**

The jurisdiction of the Honorable Supreme Court to entertain this Appeal stems from Article V of the Constitution of Puerto Rico, from the powers and venue of this High Court according to its Constitution, 4 L.P.R.A. section 31 *et seq.*, from Rules 53 and 54 of the Rules of the Supreme Court, which have been complied with in this

Appeal, and from Rules 52, 53, and 54 of the 1979 Rules of Civil Procedure.

The term to notify and perfect the Appeal expires on January 14, 1985.

### **The Judgment Appealed**

From the above-mentioned declaratory judgment, we accept as correct the Findings of Fact; the narrative statement of the facts and of the controversies raised; the conclusions of law to the effect that defendant's application of the law and regulations on games of chance has been arbitrary, inconsistent, erratic, absurd, erroneous, and, hence, unconstitutional; and the corresponding statements in the Judgment.

We take appeal from the conclusion of law which states that section 8 of Act No. 221 of May 15, 1948, as amended, is not unconstitutional on its face, and the corresponding statement in the Opinion and Judgment, conclusion of law No. 4 to the effect that the lawmaker's classification warrants only the traditional analysis and does not violate the equal protection of the laws, and the corresponding statements in the Opinion of the Honorable Judge to hold that such classification does not violate the equal protection of the laws.

We do not anticipate the need for a transcript of the evidence presented, and not even for a narrative statement of the facts, unless defendant-appellee controverts them.

### **Constitutional Issues Raised**

Act No. 221, *supra*, was signed into law before our Constitution was approved. The doctrine of free expression has evolved ever since. Prior restraint of the right of expression creates a presumption of constitutional invalidity. *Peña Clos v. Cartagena Ortiz*, 83 J.T.S. 83; *Pueblo v.*

*Santos Vega*, 84 J.T.S. 102; *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The bar against advertising casinos to the public in Puerto Rico infringes upon the right of expression protected by the Bill of Rights of our Constitution and of the United States Constitution. The statute's vagueness and over-breadth not only infringes upon the constitutional freedom of speech, but also violates the due process of law guaranteed by the Constitution in failing to give adequate publicity to the conduct proscribed and in encouraging and/or allowing arbitrary case by case application, depending on the subjective interpretation of each officer. A law that bars the holder of a license to operate a legal gambling business from fully advertising his endeavor creates a classification in terms of the protection afforded by the first amendment of the Constitution of the United States and by our Bill of Rights, particularly when it allows similar businesses to advertise themselves. If it is determined that infringement upon the freedom of speech is invalid, then, the classification itself is also invalid. In both cases, when constitutionally protected rights are at stake, a strict judicial scrutiny is in order.

The recent doctrine on commercial speech protection has been gradually placing commercial speech on the same footing with the freedom to express words and ideas. It was first determined that the state may restrict advertisement of an illegal commercial activity to develop then a corollary legal rule: if the activity is legal, the state cannot bar advertisement thereof. The following constitutional controversies must be resolved in the light of the foregoing synthesized contentions:

1. Whether section 8 of Act No. 221 of May 15, 1948, as amended, is unconstitutional because it violates the right of free expression in general; and the freedom of commercial speech in particular.

2. Whether section 8 of said Act is unconstitutional because it violates the equal protection of the laws.
3. Whether the aforesaid section 8 is unconstitutional due to its over-breadth and vagueness because it lacks the reasonable guidelines or parameters in violation of the due process guarantee.
4. Whether the absolute bar or prior restraint on the publication of any advertising about casinos—vis-à-vis the vagueness and latitude of the statute, and in view that no other legal game classifications are forbidden from advertising in Puerto Rico—warrants a strict judicial scrutiny to uphold a decree of constitutionality.
5. Whether the state interest surpasses the rigor of the constitutional clause in case the cited section of the act, and the regulatory provisions adopted thereunder, violate the fundamental right to the freedom of speech.
6. Whether the statutory bar is broader than necessary for protecting the public purpose sought, and, hence unconstitutional.

The constitutionality of the statute better known as the Gaming Act is not challenged. The challenge centers on the validity of its section 8, which provides:

"No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico; or to admit persons under eighteen years of age."

We also challenge the regulations adopted thereunder regarding the bar against the advertisement of casinos not limited to form, time, and place.

### Conclusion

The zeal, interest, and responsibility of the Trial Judge upon exercising his adjudicative function moves us to explain to the Court from which the appeal is taken why we insist that section 8 of the Games Act is unconstitutional on its face.

We are dealing here with a statute which is unconstitutional on its face, the application of which is continuous and recurrent. The Honorable Superior Court's decision would force us to be continuously resorting to the judicial forum in search of a remedy. Naturally, this would be repugnant to the judicial policy in force in the Puerto Rican procedural system, and would also constitute an undue intervention with plaintiff-appellant's freedom of speech in a continuous and irreversible manner.

By way of illustration, this Honorable Court may take judicial notice of the recent labor dispute that took place in the appellant hotel, which culminated in a strike that was greatly publicized in Puerto Rico. That was one of the innumerable occasions when it was or would have been indispensable for the casino operator to publish the advertisements impermissibly barred by the Regulation.

The evident recurrence of the serious situation in which plaintiff-appellant finds itself due to the effectiveness of a statutory provision that is unconstitutional on its face justifies that this Honorable Court assumes jurisdiction in this case.

WHEREFORE, we respectfully pray the Court to reverse, after the pertinent statutory proceedings, the lower court's determination in that part of the Judgment which declares that the statutory provision in controversy is constitutional on its face, and to decree the unconstitutionality of the same in absolute terms.

Respectfully submitted in San Juan, Puerto Rico, this 14th day of January, 1985.

I CERTIFY: That on this same date I have sent, through certified mail, return receipt requested, a true and exact copy of the foregoing Notice of Appeal to Juan A. Correa Suárez, Esq., P.O. Box 4435, Old San Juan Station, San Juan, Puerto Rico 00905; and to José Alberto Moure, Esq., P.O. Box 192, San Juan, Puerto Rico 00902.

(Sgd) María Milagros Soto  
MARIA MILAGROS SOTO  
Banco Central Bldg.  
Suite 815  
Hato Rey, P.R. 00917  
Tel. 754-1920 / 1717

# APPENDIX E

(Translation)

## IN THE SUPREME COURT OF PUERTO RICO

Appeal from the Superior Court, San Juan Part

Declaratory Judgment

No. O-85-14

POSADAS DE PUERTO RICO ASSOCIATES, INC.,  
d/b/a Condado Holiday Inn

Plaintiff-Appellant

v.

PUERTO RICO TOURISM COMPANY

Defendant-Appellee

## MOTION FOR RECONSIDERATION

### TO THE HONORABLE SUPREME COURT OF PUERTO RICO:

Comes now the Plaintiff-Appellant through the undersigned attorney and very respectfully prays this High Court to reconsider the Resolution of February 7, 1985, which dismissed the appeal of the Declaratory Judgment rendered by the Honorable Superior Court Judge, Guillermo Arbona Lago, of the San Juan Part, served on February 11, 1985, and received by the plaintiff-appellant on February 12, 1985, deeming that a substantial constitutional question has not been raised.

We respectfully allege that an absolute prior restraint ("total ban") on the right of freedom of expression raises a constitutional question as substantial as our democratic system.

It has been thus understood by the United States Supreme Court which has issued the writ adjudicating the issue in the following cases: *United States v. O'Brian*, 391 U.S. 367 (1968); *Procunier v. Martínez*, 416 U.S. 396 (1974); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia Pharmacy Board v. Virginia Consumer Counsel*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 48 L.W. 4783 (1980); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Schad v. Borough of Mt. Ephraim*, 49 L.W. 4597 (1981); *Sambo's Restaurant, Inc. v. City of Ann Arbor*, 50 L.W. 2286 (1981); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Min. v. Century Camera, Inc.*, 50 L.W. 1038 (1981); *Globe Newspaper Co. v. S. Ct. for the County of Norfolk*, 50 L.W. 4759 (1982); *In re R.M.J.*, 50 L.W. 4185 (1982); *National Ass'n for the Advancement of Colored People v. Clairborne Hardware Company*, 50 L.W. 5122 (1982); *Bolger v. Youngs Drug Products Corp.*, 51 L.W. 4961 (1983); *F.C.C. v. League of Women Voters of California*, 52 L.W. 5008 (1984); *Clark v. Community for Creative Non-Violence*, 52 L.W. 4986 (1984); *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 52 L.W. 4875 (1984).

In *Bolger*, *supra*, the Supreme Court of the United States makes an excellent analysis-synthesis of the American case law, including the contribution of the cited cases to the great defense of the constitutionally protected right of expression under the first amendment of the United

States Constitution which has been elaborated by that High Court.

Since *Aponte Martínez v. Lugo*, 100 P.R.R. 281 (1971), this Honorable Supreme Court held that the freedom mentioned in the Constitution of Puerto Rico and in the First Amendment, protected by the Fourteenth Amendment to the United States Constitution, encompasses freedom of speech, and adopted the tests laid down in *O'Brian*, *supra*, in *Soto v. Giménez Muñoz*, 112 D.P.R. 477 (1982), stating:

"The truly democratic ideal on which our Constitution is based conceives freedom of speech . . . 'within the most ample' view . . . the Bill of Rights expressly provides that 'no law shall be made abridging' such freedoms."

and citing *Bellotti*, *supra*, with approval, in which case the Honorable Justice Marshall had stated that the protection of the freedom of expression is almost undefeatable vis-à-vis prior restraints.

Also, recently, this Honorable Court stated in *Pueblo v. Félix Santos Vega*, 84 J.T.S. 102:

"Films and similar objects (books), magazines, and other publications) cannot be seized without a constitutionally valid warrant; the contrary would be prior restraint."

This trend followed in this case and the expressions of this Honorable Court in *Zachry Int. v. Tribunal Superior*, 104 D.P.R. 267 (1975), to the effect that a prior and absolute restraint on every expression involving an activity authorized by the Government through legislation is unconstitutional, convinced us that the writ requested would be issued.

Section 8 of Act No. 221 of May 15, 1948, as amended, constitutes an absolute prior restraint on every expression

involving games of chance, authorized by law and, therefore, legal.

In *Pittsburgh Press*, *supra*, the United States Supreme Court laid down the following test: if the activity is *illegal*, the State may forbid advertising of the same. In *Bigelow*, *supra*, the test was broadened to the effect that if the activity is *legal*, advertising thereof cannot be banned. And, in *Virginia State Board of Pharmacy*, *supra*, commercial expression was afforded the same protection given to pure freedom of expression.

Our state of the law is at the *Bigelow* stage.

We respectfully understand that a citizen who operates a legal business like any other business cannot be wholly gagged.

We respectfully pray the Honorable Court to reconsider its resolution, to issue the writ requested and to give us the opportunity to further elaborate our arguments in the brief on appeal contemplated by the Rules of the Honorable Supreme Court of Puerto Rico.

In San Juan, Puerto Rico, this 22nd day of February 1985.

(Sgd) María Milagros Soto  
 María Milagros Soto  
 Attorney for Plaintiff-Appellant  
 Banco Central—Suite 815  
 Hato Rey, Puerto Rico 00917  
 Tel. 754-1920/1717

I CERTIFY that on this same date I have sent a copy of this Motion for Reconsideration to Juan M. Correa Suárez, Esq., attorney for Defendant-Appellee, and to José Alberto Moure, Esq., attorney for the Secretary of Justice, to their addresses of record.

(Sgd) María Milagros Soto  
 María Milagros Soto

# CHIEF CLERK'S CERTIFICATE

I, Heriberto Pérez Ruiz, Acting Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the annexed documents are photocopies of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the Appeal to the Supreme Court of Puerto Rico dated January 14, 1985, in case No. O-85-14 (Superior Court No. 82-1508 (908)), and the Motion for Reconsideration dated February 22, 1985, in the case of *Posadas de Puerto Rico Associates d/b/a Condado Holiday Inn v. Puerto Rico Tourism Company*, the originals of which, in Spanish, are under my custody in this Office.

IN WITNESS WHEREOF, and at the request of the Office of the Solicitor General of Puerto Rico, I issue these presents for official use, fee-free, under my hand and the seal of this Court in San Juan, Puerto Rico, this 24th day of January 1986.

/s/ HERIBERTO PÉREZ RUIZ  
 Heriberto Pérez Ruiz  
 Acting Chief Clerk  
 Supreme Court of Puerto Rico

[SEAL]

# **REPLY BRIEF**

16  
No. 84-1903

IN THE

**Supreme Court of the United States**

October Term, 1985

Supreme Court U.S.

FILED

APR 16 1988

JOSEPH F. SPANIOL, JR.  
CLERK

POSADAS DE PUERTO RICO ASSOCIATES, d/b/a Condado Holiday Inn,  
*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

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**REPLY BRIEF FOR THE APPELLANT**

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MARIA MILAGROS SOTO  
Banco Central Building  
Suite 815  
221 Ponce de Leon Avenue  
Hato Rey, PR 00917  
(809) 754-1920/1717  
*Counsel for Appellant*

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5/19/88  
9/1/88

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No. 84-1903

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1985.

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POSADAS DE PUERTO RICO ASSOCIATES, d/b/a Condado  
Holiday Inn,

*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO.

**REPLY BRIEF FOR APPELLANT.**

Posadas de Puerto Rico Associates, the Appellant, replies to the Brief filed for Appellee in an effort to limit our oral jurisdictional argument to the substantiality of the constitutional question before this Court and rely on our briefs for the remaining procedural and substantive aspects of the question; and, as officer of this Court, correct certain misrepresentations that may mislead the Court.

On the merits, our reply will be strictly limited to the new position taken by the Appellee regarding the legislative intent of Section 8 of Act 221 of May 15, 1948, as amended (15 L.P.R.A. Sec. 77), as the state's substantial interest; and its untenable petition, on page 22, that the advertising of gambling casinos be considered unprotected by the First Amendment, as is advertising illegal behavior, as are false, deceptive or misleading sales techniques, and child pornography, offensive speech and obscenity—an extreme and backward position in the development of First Amendment rights up to this point not advanced by government in this case.

**The Jurisdictional Challenges Raised By Appellees are Frivolous and Contradicted by the Record.**

The Commonwealth's statute was challenged at the administrative level. See Appendix H to the Jurisdictional Statement.

Briefly, the controverted ruling of February 16, 1979 (JA [R 46] 6a) sets forth the agency's interpretation of section 8 of Act 221, *supra*. The section is quoted therein. An absolute ban on all speech related to casinos or its facilities *in any manner whatsoever* was advanced as the government position. This unconstitutional construction was applied to Posadas on February 20, 1979 (JA [RP 11] 44a); circulated to all casino franchise holders on March 12, 1979 (JA [RP 12] 54a); and again enforced on August 31, 1981 against Posadas because "Mr. Andrews sponsored a *press conference* and a photographic session<sup>1</sup> at the facilities of the Condado Holiday Inn Casino" (JA [RP 13] 55a). The last fine under section 8 of the statute was paid under protest on September 18, 1981 (JA [RP 17] 60a).

Posadas' letter of February 24, 1982 (JSA H) challenges the ruling, and explicitly challenges section 8 of the statute. Appellee is correct in stating that the statute as a whole was not challenged. Only the severable section 8 of the statute has been the controversy from the initial stage of the case.

The constitutional issues were properly raised before Appellee by Posadas although it was aware that the agency could not declare the statute unconstitutional but merely interpret it prospectively in a reasonable and constitutional manner (at page 5h). That federal First Amendment and Equal Protection claims were specifically raised at this level arise from page 4h of JSA H. Since speech is not a First Amendment right under the Commonwealth's constitution but a guarantee under its Article II,

<sup>1</sup>Appellee's representation that Posadas was fined for the photographic session *only* is a misstatement (CB, pp. 15, 48; JSA B, 19b). Only major misstatements will be addressed in this Brief.

section 4 (JSA J, 2j), Posadas continuous reference to the First Amendment raised the federal question. Furthermore, at page 6h, we clearly notified Tourism that we would challenge in Court "the constitutionality and validity of the advertising prohibition of the Act and Regulations" as well as its erroneous application. This letter, sent to the agency was not necessary, proceduralwise, before seeking declaratory relief because this case arises as a declaratory judgment—not as a revision of an administrative decision. While the statutory and constitutional issues were properly raised before the agency with fair precision, the earliest stage they had to be raised in was in the Complaint. In paragraph 9 of the Complaint (JSA I, 4i) the invalidity and unconstitutionality of the statute was clearly raised before the Superior Court of Puerto Rico under both the United States and Puerto Rico Constitutions.

We have already discussed in our Brief, at pp. 7-8, that the jurisdictional requirement of properly raising the federal question in state court was met at every stage of the proceeding. The official record is before this Court as direct proof of the discharge of our compliance with the jurisdictional requirements. What is also evident from the record is Appellee's failure to properly raise any of the objections it has raised in its Brief.

The timeliness of the appeal under Puerto Rican law, however, requires clarification.

**The Term In Rule 53.1(a) For Notifying the Puerto Rico Supreme Court That An Appeal Has Been Filed in a Superior Court Is Not Jurisdictional.**

Posadas does not contest that the copy of the appeal, timely filed in the Clerk's Office of the trial court at 4:21 p.m. on January 14, 1985, did not reach the Supreme Court Clerk's Office until 5:06 p.m. of the same day. This excusable six-minute delay did not deprive the Supreme Court of Puerto Rico of jurisdiction, and much less does it deprive this Court of its jurisdiction.

Appellee's statement that, under the *Tim Manufacturing Co. v. Shelley*<sup>2</sup> case, had the Supreme Court of Puerto Rico been aware of the late filing it would have dismissed the appeal, both underestimates the competency of our Justices as well as misrepresents to this Court the local law.

*Tim* is not applicable to our case. There, the Rule in question was Rule 53.1 (b) of the Rules of Civil Procedure dealing with review, which is perfected by filing a petition with the Clerk of the Supreme Court within thirty (30) days after the entry of a copy of the notice of judgment rendered by the Superior Court, (CBA B, 1c). Obviously, an untimely filing would bar review. The rule in question in our case is Rule 53.1 (a) dealing with review by appeal, which requires the appeal to be filed—not directly before the appellate court but—with the trial court. A copy of the appeal is required to be filed before the appellate court within the same 30 day term. In the first instance, the term is jurisdictional; in the second instance, it is not.

Appellee submitted to this Court a certified translation of the *People of Puerto Rico v. Roberto Fragoso Sierra*<sup>3</sup> case, which case involved Rule 194 of the Rules of Criminal Procedure that required a notification to the Court Clerk of an appeal filed at the trial court. The Supreme Court of Puerto Rico analyzed the Statement of Motives and legislative debate of the Rules of Criminal Procedure's bill and found that "the aim was to establish a norm of strict compliance in order to strengthen the supervisory function of the appellate courts" (CBA C, 1k) and that the legislator had stated for the record that the term was *not jurisdictional*. It held that the appeal notification term was not jurisdictional but should be strictly complied with to allow the Court to exercise its supervisory functions. There, a five month delay, not justified to the Court, barred the appeal.

The Supreme Court of Puerto Rico has already interpreted the rule at bar in the case of *Morales v. Mendez Mas*, 109 D.P.R. 843 (1980). In line with *Fragoso Sierra*, it held that the term provided by rule 53.1(a) to file a copy of an appeal with the

<sup>2</sup>*Tim Manufacturing Co. v. Shelley, et al.*, 107 D.P.R. 530 (1978), 109 D.P.R. 536 (1980), (CBA C, 1i).

<sup>3</sup>109 D.P.R. 536 (1980), (CBA C, 1i).

Clerk of an appellate tribunal, *is not jurisdictional in nature* although of strict compliance (PRBA A, 1a). In *Morales*, notice was never filed—for which reason the Court sustained the dismissal of the appeal. In our case, the appeal was timely filed. The notice was filed the same day with the Clerk as the office was still open even though presumed to close at 5:00 p.m. under our Rule 48(a) of the Puerto Rico Supreme Court Rules. The delay was negligible. Rather than presume that the Commonwealth Supreme Court was unaware of the untimeliness of the notice of appeal, the contrary should be presumed—both in fact, and in law. In fact, not only the Justices of a Supreme Court but its Clerk and staff carefully verify the filing requisites of any writ. In law, the term is not jurisdictional, but discretionary. The view of the local Court on the late filing, when dismissing the appeal for want of a substantial federal question rather than on procedural grounds, is perhaps best exemplified by its own statements in *Banco Metropolitano v. Berrios*, 110 D.P.R. 721 (1981), (PRBA B, 1b):

"The court finding of just cause to enlarge the term of the summons, absent abuse of discretion, *should be inferred from its refusal to impose the sanction of dismissal with prejudice*. The discretion reserved to judges is the most powerful instrument of justice. Equity was born precisely from the need to moderate the strictness of the rule by resorting to the trier's conscience. The sanction of dismissal with prejudice provided by Rule 4.3(b) for the failure to serve summons is predicated on the court's discretion in the determination of just cause. The expiration of the six-month term does not have the effect of extinguishing the summons, or of annulling it, and much less does it affect the Court's jurisdiction. Even applying the rule with the utmost severity, it would have no more coercive force than that associated with strict compliance, as in the case of Rule 53.1(a), which makes obligatory the filing with the appellate court of a copy of the writ of appeal. (*Morales v. Mendez Mas*, 109 D.P.R. 843 (1980)); or that of prior notice to the State of a civil action for damages (*Loperena Irizarry v.*

*E.L.A.*, 106 D.P.R. 357 (1977)), which rules are influenced by the moderating intervention of judicial discretion when the judge notes the existence of just cause at an early stage in the proceedings. Enlargements of time should always be granted in the face of meritorious circumstances that outweigh the critical severity of the judge, which is always oriented towards compliance with the terms, a vital element in the speedy and just disposition of cases. Rule 6.7.

*"In view of these precedents and grounds, the petition shall be granted, and the resolution of September 23, 1980, dismissing the complaint for lack of prosecution, will be set aside."*

It is pertinent to emphasize that Appellee did not appear before the Puerto Rico Supreme Court to raise this or any other defense. Thus, the Commonwealth *untimely raises a question of local law* before this Court. In fact, Appellee did not even timely move *motu proprio* to dismiss or affirm the judgment below until so ordered by this Court. And, in its Motion to Affirm, the Commonwealth conceded that the claim of invalidity had been timely and properly presented.

#### **The Appeal Properly Framed the Federal Question.**

Appellee's claim that the federal question was not properly presented to the Supreme Court is without merit.

The Commonwealth Supreme Court Rules do not, as opposed to this Court's Rules, require a Jurisdictional Statement. All that Rule 15 (4 L.P.R.A. Ap. I-A) of the Puerto Rico Supreme Court Regulations require is that the appeal be filed with the trial court and that said appeal contain the following: the title and number of the case as appeared before the trial court and all requirements of the pertinent rule of Civil Procedure. In turn, Rule 53.2 of Civil Procedure (32 L.P.R.A. Ap. III) requires, in addition to the caption, that the appeal must designate the judgment or part of the judgment appealed, the constitutional ques-

tions involved, *when the law requires it*; and that it designate the appellate Court.

These are the requirements. We exceeded them. They are similar to those required to appeal to this Court or any federal court. As compared, for instance, with the Notice of Appeal filed with the Clerk of the Supreme Court of Puerto Rico when appealing to this Court (JSA F, 3f) our Notice of Appeal to the Commonwealth Supreme Court was really a brief Jurisdictional Statement not even required by the rules. But, because there is no such requisite in the local rules, or further opportunity for the appellant unless the appeal is granted, we presented more extensively than necessary the federal questions in issue to move the Court to note probable jurisdiction.

Our Notice was as extensive as time allowed then. Neither Posadas, nor Tourism had planned to appeal the Declaratory Judgment. The following issue covered by the press indicated the need to challenge the validity of the statute. Posadas casino employees were picketing the hotel facilities, untruthfully informing the public that the casino was closed. When Posadas displayed a sign on its premises informing the public that it was untrue that the casino was closed, as the pickets announced, but that it was, in fact, open; the casino employees publicly denounced that Posadas violated the gaming law and publicly complained that the Commonwealth was allowing the violation of the law (PRBA C, 1c). Posadas concluded that it had a right under the free speech proviso of the National Labor Relations Act to be able to denounce a misuse of the pickets free speech rights and a constitutional right to be able to communicate matters of public concern, as is a labor dispute, vital to its business, without the constant interference of the Commonwealth. It became apparent to Posadas that the unconstitutional behavior by Tourism was not only capable of endless repetition; but that it had, in fact, been manifested once again and would recur as long as the statutory ban on information to the public in Puerto Rico remains. The decision to appeal was thus made and the notice of appeal was filed. In it, we briefly mention the recurring nature of the unconstitutional behavior, and specifically

mention the labor dispute that required the availability of open channels of communication, asking the Court to take judicial notice, as the issue of the sign had been notoriously covered by the newspaper and broadcasting media, that this was one of the cases when it was indispensable for a casino operator to make reference to its legitimate business (JSA C, 8c). We request that this Court takes judicial notice of two newspaper articles that publicized the after-trial controversy that moved Posadas to appeal.<sup>4</sup>

Since the constitutional questions had been raised from the initial stage, and a copy of the Complaint was appended as well as the extensive Declaratory Judgment, the Commonwealth Supreme Court had properly before it the federal question, later more explicitly detailed in the Rehearing Petition (JSA D).

One last comment. At page 9 of Appellee's Brief, it is argued that the mistaken reference to the First Amendment in lieu of the Fifth or Fourteenth Amendment in the framing of the following constitutional issue makes it insufficient to bring a federal claim with fair precision:

"A law that bars the holder of a license to operate a legal gambling business from fully advertising his endeavor creates a classification in terms of the protection afforded by the First Amendment of the Constitution of the United States and by our Bill of Rights, particularly when it allows similar businesses to advertise themselves."

There is no mistaken reference to the First Amendment. We mean First Amendment and not Fifth or Fourteenth Amendment. A penalty for the exercise of speech by a class of people (First Amendment) creates by itself a suspect classification in addition to the favoritism dispensed to other games of chance,<sup>5</sup>

<sup>4</sup>Since Judicial notice is being petitioned, we have reproduced the original Spanish articles of the newspaper as well as their translation.

<sup>5</sup>*Bolger v. Young Products Corp.*, 463 U.S. 60 (1983); *Pacific Gas & Electric Co. v. Public Service Comm'n.*, 54 LW. 4149 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

that require heightened scrutiny. But, because we have a strong First Amendment challenge, we have at all times centralized our attention on it, without abandoning the Equal Protection and Due Process challenges—also present—but which the Court may find unnecessary to reach.

## (II)

**To Classify Truthful Information about Legal Gaming in Puerto Rico Together with Illegal Activity and Fraudulent Information as Unprotected Speech is To Backstep Eleven Years in the Jurisprudence Carefully Crafted by this Court.**

Perhaps the best evidence of the need to strike down Section 8 of the Gaming Act has been provided to this Court by Appellee's plea. Posadas could not have portrayed better government's unsurmountable wall of resistance to any communication on casinos, regardless of its social value, regardless of its truthfulness, based solely on content—all of which is impermissible under the Constitution. Casino advertising is constitutionally protected.

Posadas, as well as third parties not before this Court, will unquestionably continue to be suppressed in their First Amendment rights; except if this Court tells the Commonwealth, that state action in the past and proposed state action directed to prohibit truthful information about an entirely legal activity is repugnant to the Constitution of the United States. The statute, as drafted by the legislators back in 1948 and as interpreted by the state court in 1984, cannot stand.

The Commonwealth misrepresents to this Court that:

"Puerto Rico does not impose a complete ban on advertising of gambling casinos to the public of Puerto Rico. As construed by the Superior Court, the statute prohibits only advertisements directed exclusively to enticing residents of Puerto Rico to visit the casino and to use its facilities."

The constitutional problem with this position is threefold: the prohibition of information on casinos to residents of Puerto

Rico is still absolute; no guidelines are provided to the officials that will be making the determination, and the determination will depend on the content of the information. This denies Posadas the equal protection of the laws by discriminating against its First Amendment rights solely because of the content of its speech, without appropriate standards to guarantee due process. *Carey v. Brown*, 447 U.S. 455, 461 (1980), *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). In these cases, this Court has clearly rejected the suppression of the ability to speak on the basis of the content of the speech or of what the speaker intends to say. The silencing of one group of speakers while not limiting other similar speakers, like lottery and horsetrack operators, creates a First Amendment classification that requires strict judicial scrutiny. In *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S.Ct. 2839, 2853 (1984), this Court held that a statute is properly subject to a facial attack where "the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech . . ." That the statute as still interpreted by the Commonwealth chills free speech is best exemplified by the official communication of the Commonwealth's Secretary of Justice of February 12, 1986. We request that this Court takes judicial notice of this undisputable authentic public document under Rule 201 (b) of the Federal Rules of Evidence, 28 U.S.C. The original letter bearing the official seal of the Commonwealth and Puerto Rico's Department of State Authenticity Certification are being filed separately in this Court and translations appended. (PRBA D, 1d)

History repeats itself. When inaugurating the facilities of the El San Juan Hotel & Casino a 52-page *English Supplement* was published in "Caribbean Business", a local newspaper. On page 33, an article about the hotel's casino was included. This article, which the Commonwealth's Secretary of Justice classified as an advertisement, was appended to his letter and is available for this Court's own interpretation of whether the public of Puerto Rico is being enticed to gamble, whether the speech is protected

commercial speech or whether it is fully protected core speech.

Whatever this Court decides, after reading the article, will depend on the content of the information.

What seems most dramatic from the Commonwealth's communication at this stage of the case is that never before had the Secretary of Justice intervened directly with Posadas, as the record shows. And, never before had Posadas been investigated for "criminal prosecution".<sup>4</sup> When faced with criminal sanctions, as in *Tornillo*, 416 U.S. at 257, Posadas must conclude that "the safe course is to avoid controversy" thereby reducing the free flow of information and ideas that the First Amendment seeks to promote. *Pacific Gas, supra*, at 4153. The deterrent effect of a penalty is very much like direct suppression. *Thornhill*, 310 U. S. 88 (1940).

Can the United States Constitution, in reason, in principle and in law, tolerate the validity of a criminal statute that so impermissibly chills or even freezes truthful speech about a legal business activity?

We think not! And . . . we pray this Court finds not.

**Where A Criminal Penalty For the Exercise of Speech is Content-Based, Regardless of the Identity of the Speaker, the Government May Not Impose It Absent a Compelling State Interest.**

Posadas acknowledges the Commonwealth's substantial interest in regulating gaming to avoid the social dangers it advances to this Court. *There is no parallel compelling interest, however, in regulating speech about gaming.*

The Commonwealth, at pages 22 and 23 of its brief, is requesting leave from this Court *to suppress* advertising of casinos because:

—such advertisements provide *no information* which could be considered necessary or even helpful for a free market economy or for public decision-making.

<sup>4</sup>The relationship between Posadas, Andrews and Williams Hospitality appears in App. D, 1d of the Brief for Appellant.

—advertising of casinos will result in excessive gambling by residents of Puerto Rico and adversely affect the health, safety and welfare of Puerto Rican citizens.

Both premises are groundless.

In the recent case of *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 54 LW 4149 (1986) this Court once more reaffirmed the doctrine that the constitutional guarantee of free speech serves significant social interests “wholly apart from the speakers’s interest in self expression”.<sup>7</sup> The critical consideration in those cases was that the State sought to abridge speech that the First Amendment is designed to protect; and that such prohibitions limit the range of information and ideas to which the public is exposed.

The Commonwealth would have this Court qualify Appellant’s First Amendment right as unnecessary or unhelpful for a free market economy or for public decision making, distinguishing it from the values and interests at stake in the cases in which this Court has found it necessary to strike down government prohibitions on various forms of commercial speech. To allow the Puerto Rico statutory ban to stand on the impermissible premise that casino information will lead to excessive gambling by residents would be to return to the *Capital Broadcasting*<sup>8</sup> stage of the commercial speech doctrine when truthful advertising could be forbidden in anything considered “harmful”.

The Commonwealth overlooks the fact that this Court upheld the right to provide information on abortions,<sup>9</sup> which could be harmful to health and morally objectionable to some. If we were to compare abortions with gaming, the balance of potential harm would weigh heavily against the former. The one deals with the loss of human life, the other deals with the loss of material goods. The analogy is merely drawn to point out the

<sup>7</sup>*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Consolidated Edison Co. v. Public Service Commission of N.Y.*, 447 U.S. 530, 544 (1980)

<sup>8</sup>*Capitol Broadcasting v. Mitchell*, 405 U.S. 1000 (1972)

<sup>9</sup>*Bigelow v. Virginia*, 421 U.S. 809 (1975)

Commonwealth’s obsolete view, even on commercial speech, as this Court has clearly expressed in *Virginia Pharmacy Board v. Va. Consumer Council*, 425 U.S. 748, 763-5 (1976):

“Moreover, there is another consideration that suggests that no line between publicly “interesting” or “important” commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions in the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensable.” (emphasis supplied)

To prohibit or regulate gaming as a threatening activity to the residents of Puerto Rico because it may increase local crime, foster prostitution, corruption and the infiltration of organized crime, disrupt moral and cultural patterns and cause excessive gambling by lower income groups may be a substantial government interest, *arguendo*. But, evidence that speech about gaming causes any of the feared evils advanced by the Commonwealth is totally lacking from the record. No proof to remotely justify an absolute prophylactic ban was availed to the Trial Court other than reliance on a legislative intent, not clearly established in the law or legislative records, which has been interpreted to mean three different concerns to date.

Perhaps the most pointed statement made to dispose of this untenable position is Justice Blackmun’s concurring opinion in *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 578 (1980) rejecting the suppression of speech “in order to influence public conduct through manipulation of the availability of information” rather than by persuasion or direct regulation of the product. The public’s right to know, and government’s impermissible attempts to influence public response by

restricting advertising have been considered by this Court in numerous cases after *Bigelow, supra*, but we will rely on *Carey v. Population Services*, 431 U.S. 678 (1977), to further this argument because in that case the Court struck down a ban on contraceptive advertising as a means to discourage promiscuity. Here, Puerto Rico bans casino advertising in an overextensive as well as ineffective means to discourage excessive gambling, a conduct analogous to the state action invalidated by this Court almost a decade ago.

The Puerto Rico ban is clearly content-based, substantially burdens free speech rights without evidence to justify Tourism's compelling interest, is not a time, place and manner regulation that leaves open other channels of communication, but an absolute ban that chills even pure free expression rights; and it is underinclusive, as it singles out casinos from other games of chance advertising. In all the above, it is clearly distinguishable from *City of Renton v. Playtime Theatres, Inc.*, 54 LW 4160 (1986). In the latter case, the restriction was on the location of the protected speech activity not on speech directly, as here. Because no ample alternative channels for information to the public in Puerto Rico about a legal business activity are open to Posadas it is not a time, place and manner regulation. *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. at 535; *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). Were it so, it still would be invalid, because it is not neutral as to the content of the speech to be regulated. *Clark v. Community for Creative Non-Violence*, 468 U.S. \_\_\_\_; 52 LW 4986 (1984); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Neither is the speech prohibition narrowly tailored to advanced the government's alleged interest. *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). The Puerto Rico ban is not content-neutral as the Renton zoning ordinance because it deals precisely with prohibition of speech to a singled-out activity it finds unacceptable while leaving an open forum to people similarly situated, including itself as advertisers of the government-run lottery.

**The Commonwealth Has Failed to Prove that a Total Ban on Truthful Casino Information Advances the Government Interest Asserted as the Most Narrowly Tailored Means to Serve that Interest.**

Excessive gambling by Puerto Ricans is the latest substantial interest that the Commonwealth asserts the legislator intended to avoid by banning speech on casino gambling. Other than by inference, nothing in the law or record sustains this objective. We have been pointing out to this Court how, as Counsel has changed in this case, the substantial interest the government is supposedly protecting has varied—from the Complaint to the Motion to Affirm to Appellee's Brief. By itself, this only brings out that casinos have been silenced all these years without a definite objective being drawn by the silencing party.

The Commonwealth defectibly draws the analogy that because Puerto Rico may outlaw casino gambling, it may outlaw advertisements designed to stimulate consumer demand for casino gambling (at page 35 of Appellee's Brief). Because the premise is erroneous, the conclusion that the regulation of speech is a valid government interest that would place casinos outside the protective umbrella of the federal constitution is fatally defective. The only substantial interest Posadas grants the state may have is the prohibition or regulation of false or misleading information. Should this not be enough to curb the feared social evils, the Commonwealth has the option of declaring gaming illegal once again. What it may not do is promote investment in an activity it has legalized; then interfere with the proper course of advertising the business. Because expression about a legal product is constitutionally protected, and gaming is legal in Puerto Rico, from the start we have argued that Appellee does not even meet the second prong of the *Central Hudson* test, in any of the substantial interests it has so far advanced.

Under the strict scrutiny required to evaluate statutes that abridge First Amendment rights, and the heightened scrutiny required for discriminatory statutes that violate Fifth and Four-

teenth Amendment guarantees, Tourism had the weight of proving that the absolute ban to the public in Puerto Rico effectively advances the control of excessive gambling without unduly burdening, more than necessary, Posadas constitutional rights. Since the last interest advanced was not even brought before the trial court, there can be and there is no evidence in the record that the Commonwealth discharged its burden of proof. Although a common sense inference that casino advertising stimulates demand from consumers may be made, no equal inference may be drawn that it will stimulate excessive gambling by local residents as the Commonwealth incorrectly suggests at page 23 of its Brief. There is no evidence that the legislator accepted this untenable conclusion as his own. The Commonwealth misrepresents to this Court that there was evidence to prove this:

"The evidence presented to the lower court in this case confirms the accuracy of the Puerto Rico legislative judgment."

We ask: what evidence?

Furthermore, Appellee misrepresents that writings and studies from Nevada, New Jersey and the judgments embodied in the English Gaming Act of 1968 were considered as indicia that restrictions on casino advertising serve as direct and effective means of avoiding excessive gambling. No studies, no writings were ever submitted to the trial court. Nor could they have served as basis to sustain the unsustainable.

First, Nevada does not ban nor restrict advertising. To apply the findings of the Commission on the Review of the National Policy Toward Gambling in their 1976 study *Gambling in America* about Nevada to Puerto Rico is to mislead the Court. Gambling in Nevada is allowed in bars and other-than-hotel establishments, with no dress requirements nor betting limits. Slot machines may be found even in the restrooms. The opposite is true in Puerto Rico. The Games of Chance Act (15 L.P.R.A. 71 *et seq.*) limits casinos to deluxe hotel premises, allows no alcohol consumption in the casinos, regulates the betting limits—including minimum bets, controls the number of slot

machines, exacts proper attire, in addition to the nature of elegance prevalent in such facilities when residents mix with affluent tourists. *The Puerto Rico experience is that the lower income people do not gamble in the casinos, but in the lottery, cockfights and horsetracks, as the trial court found.* Interestingly, this lower income strata of residents are not protected from massive advertising from the government when promoting lottery bets through television and print media, nor by other gambling operators—other than the discriminated casino operator. The legislative "concern" that this group be shielded from "casino gambling stimulation", is suspect since it did not ban speech on those gambling activities highly pursued by that group. No good cause has been provided to justify singling out casinos; and thus that the means chosen directly advance the government interest.

Second, New Jersey originally had a prior censorship on casino advertising similar to Puerto Rico's out of state advertising, which was abandoned in favor of "good taste" regulations and "more speech" requirements directed to avoid false, deceptive or misleading information—a legal objective as opposed to Puerto Rico's illegal objective.<sup>10</sup> If the New Jersey experience were to be relied on, then the correct deduction would be that prior censorship was abandoned because it did not advance the government interest, or was more extensive than necessary.

Third, English Gaming Law should be the last source used to support Puerto Rico's constitutional defense. There, gaming was legalized, not to promote economic development or recovery as in New Jersey, Nevada or Puerto Rico but to provide an outlet for local unstimulated demand.<sup>11</sup> Thus, the whole purpose of the English Gaming Act is to provide an outlet for unstimulated demand for gaming which might otherwise seek an illegal outlet and the limitation on speech directly advances the government objective, which is not Puerto Rico's case, of course. Whether in England such suppression of speech may be

<sup>10</sup>New Jersey Casino Control Act, N.J. Stat. Ann., Ch. 51 sec. 19:51-1.2 (West Supp., 1984).

<sup>11</sup>Eddy & Loewe, *The New Law of Gaming*, pp. 120-199, (London, 1969) (Appellee's cited sources).

valid should be the last recourse this Court be asked to use in interpreting American Constitutional Law. After all, it was from England's excesses and interference with individual's rights that the Framers of our Constitution fled from, and proclaimed their independence from.

Puerto Rico's unlawful objective in prohibiting all information on casinos to residents is to impose on an adult society its own conception of what is good or bad for it. The state decided that it is not "harmful" to bet (excessively) on horses, nor cocks, nor bingos, nor in the government-sponsored lottery. What is "harmful" for them is to gamble in, or even visit,<sup>12</sup> the casinos because such incidental visit may spur the "vice" inherent in casino gambling with "the inevitable result of excessive gambling by people who are attracted by those advertisements". Is there a common sense link that people who read information on casinos or gaming will, as a result, excessively gamble? And, that therefore they should not be allowed to hear or see any truthful information about a legal business as the only means to advance the foggy government interest advanced to this Court? The next step in this myopic, paternalistic view would reasonably be to prohibit not only Posadas but also the people from speaking about this "vicious" activity.

It must be evident to this Court that we have avoided the term "casino advertising" as such, as opposed to Appellee. If not evident, the reason is that in past application of the statute as well as its present application, not only advertising, as commercially known, is at stake. Again, Tourism's assertion, at page 38, that Posadas would not contest the restrictions so vigorously unless it firmly believed that casino advertising would increase the gaming activities, is wrong. The record shows that the Puerto Rican market is secondary but that the limitation affected casino promotion to the tourist. (JSA B, 24b, PRBA E, 1c).

While not denying that legal business information may bring additional local business, Posadas concern continues to be twofold:

<sup>12</sup>Page 24, 35, 38, 42 of Appellee's brief.

1. as a matter of practicality, the local court's guidelines of allowing speech addressed to nonresidents while maintaining the prohibition to residents, in addition to being unconstitutional continue to chill Posadas speech addressed to tourists because *all* speech will be subject to a content-based analysis by Tourism. A bona fide interpretation of what is permissible by Posadas may be subject to criminal sanctions as exemplified by the letter from the Secretary of Justice (PRBA D).
2. as a matter of principle, Posadas cannot accept an absolute ban on valid speech about its legal business that deprive both the speaker and the listener of their First Amendment rights in order to advance a goal that may be served best by less restrictive means, knowing Appellee's own distaste of speech about casinos, as the unlawful interference with Posadas and third parties will never end.

The Commonwealth surprisingly requests that this Court treat the local court judgment, *as if Puerto Rico were a State*, a position unfavoured to date by the administration now in power. Posadas has no quarrel with this alternative. Because *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) seems to be good case law still, and there this Court specifically refers to Puerto Rico, we petitioned that the Court opt to interpret section 8 itself, rather than defer to the construction of the Puerto Rico Superior Court. But, it is of no consequence if this Court rather determines that the *New York v. Ferber*, 458 U.S. 747 (1982) state court deference be extended to Puerto Rico. The result, we foresee to be the same—in line with the firm approach this Court has used in every case that public ignorance, instead of enlightenment, has been the means chosen to maneuver consumer reaction to products considered objectionable by those in power, or because of disagreement with the message. *Virginia Pharmacy Board v. Va. Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); *Members of City Council v. Taxpayers for Vin-*

cent, 104 S.Ct. 2118 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) and other cases cited in our Brief for Appellant. Broad prophylactic rules as is the statute in issue, are suspect. *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Zauderer v. Office of Disciplinary Counsel*, 53 LW 4587 (1985). Strict scrutiny that requires government to prove a compelling interest that would justify the violation of constitutional rights is the proper test required in this case. *Central Huson, supra*. In point is the *Bolger* reasoning:

"... At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression... We (have) specifically declined to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech."

#### Conclusion.

The facial validity of section 8 of Act 221 of May 15, 1948 has been properly drawn in question. The question is so substantial, that this Court not only has jurisdiction but has, on appeal, the responsibility of deciding the facial constitutional validity of Section 8. In line with applicable case law, in harmony with the rank the Framers of the Constitution extended to Freedom of Speech, the prohibition of speech concerning casinos to the public in Puerto Rico, as originally conceived or as construed, is repugnant to the Constitution of the United States.

Respectfully submitted,

MARIA MILAGROS SOTO  
Banco Central Suite 815  
Hato Rey, PR 00917  
Tel. 754-1920/1717

Attorney for Appellant

April 15, 1986.

1A

#### Appendix A.—(Translation)

IN THE

SUPREME COURT OF PUERTO RICO

LUCIA MORALES, etc.,

*Plaintiffs-Respondents,*

v.

LUIS MENDEZ MAS, Etc.,

*Defendants-Petitioners.*

No. 0-80-141

Certiorari.

San Juan, Puerto Rico, June 16, 1980

PER CURIAM: On May 14, 1979, the petitioners filed an appeal before the Superior Court contesting a judgment issued on May 3 by the District Court. Copy of the notice of appeal was never filed with the clerk of the appellate court on or after the term specified in Rule 53.1(a) of the Rules of Civil Procedure.<sup>1</sup>

<sup>1</sup>Rule 53.1(a) provided:

"(a) An appeal is perfected by filing a notice of appeal with the clerk of the Part of the Court where the case was heard, and a copy thereof shall be filed in the Clerk's Office of the Court of Appeals, within thirty (30) days after a copy of the notice of judgment is filed in the record of the case."

The new Rule 53.1(a) did not amend said provision.

The Superior Court dismissed the appeal on the grounds that the filing of said notice of appeal before its clerk was a jurisdictional requirement. On April 10, 1980, we issued an order to show cause why the principle set forth in *Pueblo v. Fragoso Sierra*, 109 D.P.R. 536 (1980), should not be applied.

Rule 53.1(a) of the Rules of Civil Procedure and the amended Rule 194 of the Rules of Criminal Procedure<sup>1</sup> dealt with in *Fragoso Sierra* were sponsored by this Court. On the latter we expressed in *Fragoso Sierra* the following:

The rationale behind this action was clearly to permit the court to take the necessary steps to properly speed up the appellate proceedings which were often delayed by an absence of control that defeated the ends of the law. The law was not made to raise further judicial barriers. The aim was to establish a norm of strict compliance in order to strengthen the supervisory function of the appellate courts . . .

The report on the proposed Rule 53.1(a) of the Rules of Civil Procedure rendered by the Senate Judiciary Committee states:

The intention of the measure was to speed up the appellate proceedings so that the appellate courts are informed of the existence of a petition and can immediately assume their supervisory function.<sup>1</sup>

<sup>1</sup>Rule 194 provides in part:

"The appellant shall file with or remit a copy of the bill of appeal by registered mail to the Office of the Court Clerk within forty-eight (48) hours following the filing of the bill at the trial court, and shall notify the prosecuting attorney of the bill of appeal within the term to appeal. Such notice to the prosecuting attorney shall be made in the manner prescribed in these rules, except as otherwise provided in the following rule."

<sup>1</sup>Committee Report of May 24, 1978, on H.B. 793, that became Act No. 23 of June 10, 1978.

This same concept was set forth in our letter of March 14, 1978, to the President of the Senate, cited in *Fragoso Sierra*. This letter to the Legislative Assembly presents an amendment to Rule 194 of the Rules of Criminal Procedure as well as an amendment to Rule 53.1(a) of the Rules of Civil Procedure. The reasons given by this Court for the approval of both measures are identical. There is no evidence in the legislative history of Rule 53.1(a) to indicate that this body sought to establish the filing of the notice of appeal before the clerk as a jurisdictional requirement.

Consequently, we resolved that the term required by Rule 53.1(a) for the filing of a copy of the notice of appeal with the clerk of the appellate court is not of a jurisdictional nature even though, as we affirmed in *Fragoso Sierra*, it is of strict compliance. We will not permit tardy filings of any copies of notices with the clerk of the appellate court unless said delay is fully and thoroughly justified.

In the case at bar there was not only an unjustified delay but a complete noncompliance with the Rule. *The writ is issued and the judgment appealed from will be affirmed.*

#### CHIEF CLERK'S CERTIFICATE

I, Heriberto Perez Ruiz, Acting Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on June 16, 1980, in case No. 0-80-141, *Morales, etc. v. Mendez Mas, etc.*, the original of which, in Spanish, is under my custody in this office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 12th day of March 1986.

HERIBERTO PEREZ RUIZ  
Acting Chief Clerk  
Supreme Court of Puerto Rico

By: Angel Luis Guzman  
Deputy Clerk

**Appendix B.—Resolution of Rafael Hernandez Carrion,  
J., Humacao Part (Translation).**

IN THE  
SUPREME COURT OF PUERTO RICO

BANCO METROPOLITANO DE BAYAMON,

*Plaintiff and Petitioner,*

v.

LUIS RAMON BERRIOS MARCANO, a/k/a Luis R. Berrios, (not served with summons); and CARMEN PROVIDENCIA RODRIGUEZ, each one individually and in behalf of their marital community,

*Defendants and Respondents.*

No. 0-80-593

Certiorari

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico, February 23, 1981

The petitioner Bank filed a civil action for collection of money and foreclosure of pledge and mortgage against Luis Ramon Berrios and his wife, respondent Carmen Providencia Rodriguez. Summons were issued on June 7, 1979, and when the original term provided in Rule 4.3(b) elapsed, the summons had not been served. On December 26, plaintiff asked for a 30-day enlargement of time; it was granted on January 2, 1980,

and the codefendant was served with summons on January 8, 1980. She filed a motion to dismiss the action on the grounds that the enlargement was requested after the expiration of the term, and thus the complainant's dismissal was compulsory and automatic, without any alternative based on the court's discretion. The court below denied the motion, but six months later, (on September 23, 1980) it reconsidered its position, in spite of many reservations, stating that "we are convinced, *against our notion of fairness*, that our resolution validating the summons served after the six-month period was wrong and we should set it aside."

The bank petitioned for certiorari and, on November 21, 1980, we issued an order to show cause why the first decision of the court below denying the dismissal should not be reinstated. Defendant-respondent has appeared with a lengthy brief containing a comprehensive analysis of this procedural situation, without mentioning the general provision on enlargements or shortenings of time contained in Rule 68.2 of the Rules of Civil Procedure of 1979.

The Rules that concern us here are:

*Rule 4.3(b)* Summons shall be served within a period of six (6) months from its issuance. Said term may only be enlarged for a reasonable period in the court's discretion if plaintiff shows just cause for the enlargement and requests the same within the period originally prescribed. If the term originally prescribed or its enlargement expires before service of summons, the case shall be dismissed with prejudice to plaintiff.

*Rule 68.2. Enlargement or Reduction of Time*

When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court, for cause shown, may at any time in its discretion, (1) with or without motion or notice, order the period enlarged or shortened if request therefor is made before the expira-

tion of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend or shorten the time for taking any action under Rules 43.3, 44.1, 47, 48.2, 48.4, 49.2, 53.1, 53.2, 53.3, and 53.7, except to the extent and under the conditions stated in them.

[1] The text of the above-copied rules clearly sets forth the importance of judicial discretion in the enlargement of terms to serve the summons—the discretion to determine, at the procedural moment when the question is raised, if there was *just cause* or *excusable neglect* in the challenged failure to act.

[2] Absent any allegation by respondent that there was highhandedness or abuse of discretion on the part of the judge validating the summons served outside the original term provided by the rules, we must assume that his first act was well grounded on just cause, even if there had been no express statement on his part that he was ordering the "obligatory" dismissal of the complaint against his idea of fairness.

Rule 4.3(b) is a parallel development of Rule 39.2(b)<sup>1</sup> on the dismissal of an action because of failure to prosecute, and both have the same purpose of speeding up litigation and moving the backlog of cases, for the former operates during the early stages of the action. The fair procedural balance would suffer if we were to deny to the party unable to serve the summons within the original six-month term the opportunity to be heard and to invoke the judge's discretion with a showing of just cause, as provided by Rule 39.2 for those cases not prosecuted during the last six months.

<sup>1</sup>Rule 39.2(b)—"Whenever a civil action shall have been pending in any court for six months without any required proceeding have been taken therein, the Administrative judge shall order dismissal thereof unless failure to prosecute is reasonably accounted for. For the purposes of this rule, motions to stay, for transfer of hearing, or for extensions of time shall not be considered a proceeding taken."

The mechanism of Rule 4.3(b), providing that plaintiff's action shall be dismissed with prejudice when the original term, or its enlargement, expires and the summons has not been served, has more of the essential nature of an instrument of the court "for the purpose of speeding up the prosecution of suits and of having the parties exercise due diligence"<sup>2</sup> than of a defense used by a defendant who, notwithstanding that, may raise it by timely pointing out to the court that the term has expired; the Clerk may do the same in the case of court orders, as in the case of Rule 39.2(b).

[3-7] The court's finding of just cause to enlarge the term of the summons, absent abuse of discretion, should be inferred from its refusal to impose the sanction of dismissal with prejudice. The discretion reserved to judges is the most powerful instrument of justice. Equity was born precisely from the need to moderate the strictness of the rule by resorting to the trier's conscience. The sanction of dismissal with prejudice provided by Rule 4.3(b) for the failure to serve summons is predicated on the court's discretion in the determination of just cause. The expiration of the six-month term does not have the effect of extinguishing the summons, or of annulling it, and much less does it affect the Court's jurisdiction. Even applying the rule with the utmost severity, it would have no more coercive force than that associated with strict compliance, as in the case of Rule 53.1(a), which makes obligatory the filing with the appellate court of a copy of the writ of appeal (*Morales v. Mendez Mas*, 109 D.P.R. 843 (1980)); or that of prior notice to the State of a civil action for damages (*Loperena Irizarry v. E.L.A.*, 106 D.P.R. 357 (1977)), which rules are influenced by the moderating intervention of judicial discretion when the judge notes the existence of just cause at an early stage in the proceedings. Enlargements of time should always be granted in the face of meritorious circumstances that outweigh the critical severity of the judge, which is always oriented towards compliance with the terms, a

<sup>2</sup>Comments of the Secretariat of the Judicial Conference, 32 L.P.R.A. App. III, Rule 4.3.

vital element in the speedy and just disposition of cases. Rule 6.7.

*In view of these precedents and grounds, the petition shall be granted, and the resolution of September 23, 1980, dismissing the complaint for lack of prosecution, will be set aside.*

Mr. Justice Martin filed a dissenting opinion in which Mr. Justice Torres Rigual joins. Mr. Justice Negrón García concurs in the result without an opinion.

BEST AVAILABLE COPY

## economía

JUEVES 29 DE NOVIEMBRE DE 1984 / EL REPORTERO

# Unión de Tronquistas apoya paro empleados Casino Holiday Plaza

EVA I. LIZARDI  
EL REPORTERO

La Unión de Tronquistas de Puerto Rico se unió ayer a los trabajadores en paro del Casino del Hotel Condado Plaza, en apoyo solidario para condenar la expedición ilegal de licencias que alegadamente está otorgando la Compañía de Turismo a los supervisores del Casino.

José Cádiz, secretario tesorero de la Unión, señaló "que la gerencia del Hotel se ha propuesto desplazar a los trabajadores "croupiers", con elementos ajenos a la industria mediante contactos en Turismo que facilitan las nuevas licencias".

El vicepresidente de la Asociación de Empleados del Casino, Víctor Villalba, sostuvo que la dirección del Hotel ha traído personal de los casinos de Atlantic City y Las Vegas, "que están tan desacreditados aquí y se les ha otorgado licencias inmediatamente".

De acuerdo con Villalba, el proceso de expedición de licencias toma entre una y dos semanas para ser certificada.

Por otra parte, el vicepresidente de la Asociación criticó la publicidad utilizada por el Hotel donde se indica que el Casino permanece abierto (The Casino is open).

"En Puerto Rico está prohibido

anunciar los casinos, pero la dirección de los Juegos de Azar junto a la Administración del Hotel han violado las leyes" declaró Villalba.

El portavoz de los empleados del Casino añadió que Luis O. Rodríguez, director de los Juegos de Azar, estaba consciente de la publicidad, aunque negó su conocimiento.

Villalba añadió que durante la última reunión entre los empleados del Casino y la dirección del Hotel el pasado miércoles, no hubo ningún adelanto porque la matrícula de trabajadores sostuvo el rechazo hacia las propuestas presentadas.

"Las negociaciones están estancadas porque ellos no se presentan a la mesa de negociación (refiriéndose a la dirección), sólo quitan y no ofrecen nada", dijo Villalba.

Declaró que el tranque se produjo inicialmente porque la dirección del Hotel propuso aumentar los períodos de trabajo y reducir los de descanso.

La Unión de Tronquistas aprovechó para hacer un llamado a diversas uniones del país relacionadas con los sectores de Turismo y Transportación a fin de "paralizar las maniobras inmorales de los grupos gubernamentales que dirigen Turismo y la Comisión de Servicio Público".

Los 140 empleados inactivos desde el pasado 8 de noviembre debido al



La Unión de Tronquistas se unió ayer a los empleados en huelga del Casino del Hotel Holiday Plaza del Condado. Este apoyo es para condenar la alegada expedición de licencias a los supervisores del Casino por parte de la Compañía de Turismo.

Durante el día de ayer este niño se dirige a los transeúntes que pasaban cerca de las líneas del piquete.



cierre patronal, manifestaron ayer en viva protesta que "no cederemos porque aquí está envuelta toda la industria del casino".

EL REPORTERO intentó comunicarse con la Directora de la Oficina de Turismo para corroborar la veracidad de las imputaciones de los trabajadores del Casino sobre la supuesta expedición ilegal de licencias, pero no recibió contestación alguna al llamado.

## Embajador EE.UU. advierte a inversionistas de México

(Second Photograph)

Caption:

Yesterday this child addressed the passer-bys who walked near the picket line.

Certified to be a correct translation from its original, Aida Torres, Adm. Off. of the U. S. Courts, Washington, D.C.

74

EL NUEVO DÍA-SABADO 22 DE DICIEMBRE DE 1984

negocios

## Croupiers niegan versión del Condado Plaza

Por SILVIA LICHIA  
De El Nuevo Día

TRES representantes de los croupiers en huelga del Condado Plaza Holiday Inn, negaron ayer que la contratación por parte del hotel de croupiers adicionales haya sido un factor para que las negociaciones entre las dos partes hayan me-

jado.

"Los croupiers viejos que saben que estamos en huelga no se atreven a solicitar trabajo," dijo Ray Sutton, un vocero de la unión. "Lo que pasa es que éstos son unos muchachos jóvenes que les comen el cerebro," añadió.

Sutton se refería al hecho de que la semana pasada el hotel

contrató unos 40 croupiers adicionales para cubrir la demanda extra que genera la época navideña, según lo hace todos los años. Hugh Andrews, presidente de la compañía que es dueña del hotel, la Williams Hospitality Management Co. dijo el jueves que en su opinión, la contratación de los croupiers adicionales había

servido como estímulo para que las negociaciones entre ambas partes mejoraran considerablemente.

El punto básico de disputa entre ambas partes es el descanso de media hora que los croupiers toman después de cada hora que trabajan. La gerencia quiere acortar ese descanso a veinte minutos, "según es la costumbre en todos los casinos de la Nación, con la excepción de Puerto Rico," dijo Andrews.

SEGUN SUTTON eso es así en el resto de los casinos de la Nación "porque no tienen una unión." Puerto Rico es el único sitio en la Nación donde los casinos están unionados, explicó Sutton.

Sutton también admitió que los croupiers de Puerto Rico ganan mucho más que sus contrapartes en la Nación. "Pero allá se trabaja a través de la propina (que reciben). Aquí casi no existe la propina," dijo. Los croupiers en los casinos continentales ganan su sueldo a base del salario mínimo.

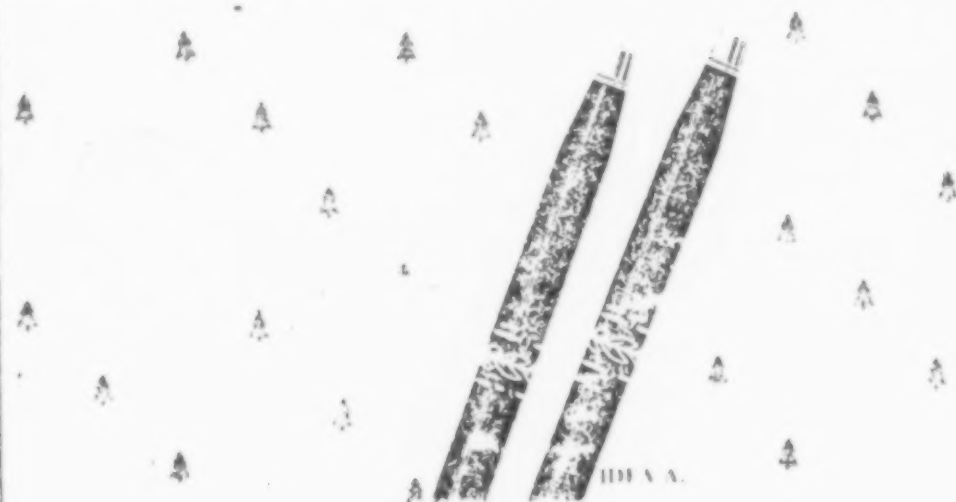


Andrews: estimuladas las negociaciones.

Uno de los rótulos que el grupo de croupiers ha desplegado prominentemente ante las últimas semanas proclama que el casino del hotel está cerrado. "El casino nunca se ha cerrado. Siempre ha estado abierto. Sin embargo ellos insisten en tener ese rótulo allí," dijo Andrews anteriormente.

### IDEAS CROSS PARA NAVIDAD

Sólo tiene que decidir a quién se las va a obsequiar.



Whirlpool NEVERA

Sólo Whirlpool le  
brinda más  
comodidad esta

### Appendix C(4).—Translation of Article.

El Nuevo Dia-Saturday, December 22, 1984

#### CROUPIERS DENY CONDADO PLAZA VERSION

by Sylvia Licha

From El Nuevo Dia

Three representatives of the croupiers on strike at the Condado Plaza Holiday Inn denied yesterday that the hiring on the hotel's part of additional croupiers was one of the factors which improved the negotiations between the two parties.

"Old croupiers who know we are on strike don't dare to request work" said Ray Sutton, a spokesman for the union. "What happens is that these are young boys who are brain-washed," he added.

Sutton was referring to the fact that last week the hotel hired some 40 additional croupiers to cover the extra demand generated by the Christmas season, as it does every year. Hugh Andrews, President of the company that owns the hotel, Williams Hospitality Management Co., said on Thursday that in his opinion the hiring of the additional croupiers had served as a stimulus for the considerable improvement of the negotiations between both parties.

The basic point in controversy between both parties is the half hour rest period that the croupiers take after every hour of work. Management wants to shorten that rest to twenty minutes, "as is the custom in all the casinos in the Nation, with the exception of Puerto Rico", said Andrews.

ACCORDING TO SUTTON this is so in the rest of the casinos of the Nation "because they don't have a union". Puerto Rico is the only place in the Nation where the casinos are unionized, explained Sutton.

Sutton further admitted that the croupiers in Puerto Rico earn a lot more than their counterparts in the Nation. "But there they work on the basis of the tips (they receive). Here there are hardly no tips", he said. The croupiers in the continental casinos earn their salary on the basis of the minimum salary.

One of the signs that the croupiers have prominently displayed during the last weeks states that the Hotel's casino is closed. "The casino has never closed. It has always been open. However they insist on having that sign there", said Andrews previously.

(Photograph caption: Andrews: negotiations stimulated.)

Certified to be a correct translation from its original.

AIDA TORRES

Adm. Off. of the U.S. Courts  
Washington, D. C.

Appendix D(1).—Letter from Secretary of Justice Dated  
February 12, 1986.



*Estado Libre Asociado de Puerto Rico*

*Departamento de Justicia*

*San Juan, Puerto Rico*

*Ldo. Felician Rivera-Lirio*  
SECRETARIO

12 de febrero de 1986

Sr. Hughes Andrews  
Presidente  
Williams Hospitality Management  
Hotel San Juan  
Isla Verde  
San Juan, Puerto Rico

Estimado señor Andrews:

El Departamento de Justicia ha advenido en conocimiento de un anuncio publicado por la administración del Hotel San Juan en el Caribbean Business, edición del 15 de enero de 1986, página 3-33. En el mismo se anuncia la actividad que se desarrolla en el casino de esa hospedería, así como otra información que surge de éste (véase copia adjunto).

Deseo recordarle que la Sección 8 de la Ley de Juegos de Azar de Puerto Rico, dispone que:

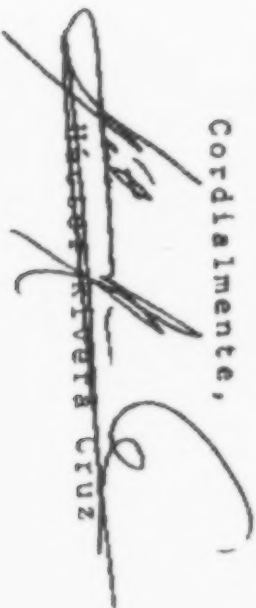
"No se permitirá a ninguna sala de juegos el anunciarse u ofrecerse al público en forma alguna ni admitir personas menores de dieciocho años de edad."

Dichas disposiciones legales aún vigentes dentro de la jurisdicción del Estado Libre Asociado de Puerto Rico contienen, además, sanciones de naturaleza criminal. Nuestras normas jurídicas aplicables también disponen penalidades criminales cuando se infringe dicha disposición. Procede en este momento advertir que este Departamento debe velar porque no se violenten las leyes y reglamentos que rigen en el Estado Libre Asociado de Puerto Rico para regular los juegos en los casinos, por lo que estoy refiriendo estos hechos al Director de la División de Investigaciones y Procesamiento Criminal de este Departamento, Fiscal Luis A. Feliciano Carreras, para que

Sr. Hughes Andrews  
Pagina Dos  
12 de febrero de 1986

investigue los mismos y me recomiende la acción a seguir.  
Agradeceré que preste a este funcionario la cooperación que  
necesite para cumplir con esta responsabilidad.

Cordialmente,



Luis A. Feliciano

ecv  
Anexo  
cc: Fiscal Luis A. Feliciano

**Appendix D(2). Translation of Letter from the Secretary  
of Justice.**

(Letterhead of Department of Justice)

Hector Rivera Cruz, Esq.  
Secretary

February 12, 1986

Mr. Hughes Andrews  
President  
Williams Hospitality Management  
Hotel San Juan  
Isla Verde  
San Juan, Puerto Rico

Dear Mr. Andrews:

The Department of Justice has become aware about an ad published by the administration of the San Juan Hotel in the Caribbean Business, January 15, 1986 issue, page S-33. The same announces the activity taking place in the casino of that hotel, as well as other information which arises from it (see enclosed copy).

I wish to remind you that Section 8 of the Games of Chance Act of Puerto Rico provides that:

"A gaming room will not be allowed to advertise or offer itself to the public in any manner nor to allow persons under 18 years of age."

Said legal provisions still in effect within the jurisdiction of the Commonwealth of Puerto Rico contain, also, sanctions of a criminal nature. Our applicable judicial norms also provide criminal penalties when this provision is violated. At this moment we wish to advise you that this Department must safe-

guard against violations of the laws and regulations which are in effect in the Commonwealth of Puerto Rico to regulate games in casinos, wherefore I am referring these facts to the Director of the Investigation and Criminal Prosecution Division of this Department, District Attorney Luis A. Feliciano Carreras, so that he may investigate the same and submit his recommendation to me on the action to be followed. I would appreciate your granting this official the necessary cooperation to comply with his responsibility.

Cordially,

HECTOR RIVERA CRUZ

ecv

Enclosure

cc: District Attorney Luis A. Feliciano

Certified to be a correct translation from its original.

AIDA TORRES

Adm. Off. of the U.S. Courts  
Washington, D. C.

## Enclosure to Appendix D.

S33 CARIBBEAN BUSINESS Wednesday, January 15, 1986

## El Casino: old world elegance and hi-tech operation

To Mike Howard, no other Casino and Hotel in the world is more beautiful than El San Juan.

"It might seem funny to say that since I work here, but I've seen them all in my business, and nowhere do you have the combination of old world elegance, beautiful natural surroundings, and modern convenience that you do in this hotel," said the newly arrived vice-president in charge of El San Juan Hotel's gaming operations.

Howard, 41, has been in the legalized gaming business for 20 years and has worked in the world's greatest casinos. He has also served as vice-president of operations for Ramada Inn (Tropicana) in Las Vegas and as consultant in their New Jersey operation.

"I've done everything you can do in a hotel, from parking cars to washing dishes to waiting tables," said Howard proudly, citing his total commitment to the service industry. "My only schooling has been in this business. It is my profession."

Howard, who learned "21" from his mother, comes from three generations of professionals in the business. His father also taught him much about the trade, and he has numerous uncles, cousins and a brother in important positions in hotels in Las Vegas and other gaming centers.

An Alabama native who moved to Las Vegas when he was 11, Howard considers his own experience somewhat unique. "There are not many families who go back three generations in the gambling business," he says with pride. His mother and grandmother, both of whom worked in casinos, showed him that women are no slackers in the casino environment. He has tried to recruit qualified women to train, and expects that they will make up 35 or 40 percent of this staff here in Puerto Rico.

The ability to interact with courtesy and confidence is one concern for Howard in hiring employees. "They must be friendly and outgoing, and make eye contact with the clients," he said. "The customer always comes first in the service business, and with a smile," he said with a smile.

The employees of the Casino are from segments of the community picked for their ability to advance with a growing company. In addition to Howard, they will be supervised by director of operations Hector Contrón and sub-

director Angel Castillo. Many are professionals who had left the island in search of work in Atlantic City, but returned home with the opening of El San Juan Casino.

The first thing a return visitor notices about El San Juan Casino is that 24 feet of wall have been removed, bringing the gaming operation right into the elegant Palm Court. About two thirds of the room and furnishings are new or completely rebuilt, with only a few elements saved from the original casino.

Although on the surface the decor in the casino is Old World, beneath the wood and crystal chandeliers the computer has taken over. Electronic control every operation, including security and the cash register. The whole casino has been wired for electronic surveillance, and discreet security personnel can observe the action at the tables from an enclosed catwalk overhead. New underground pneumatic tubes have been installed and computers are a big help in establishing credit, handling telephone communications, and exchanging money.

Some of the original chairs from the old casino have been retained, but the roulette wheels have been brought from Spain and Puerto Rican cabinetmakers made all the new tables.

Jorge Roselló, interior designer for the new casino, has made the entire room reflect seriousness, elegance and luxury. "Traditionally the colors red, gold, mauve, and some greens are very appropriate for a casino," Roselló says, pointing out some of these hues in the elegant, multi-colored Aaminster rug, and in the lush red material used to brighten the original dark wood walls.

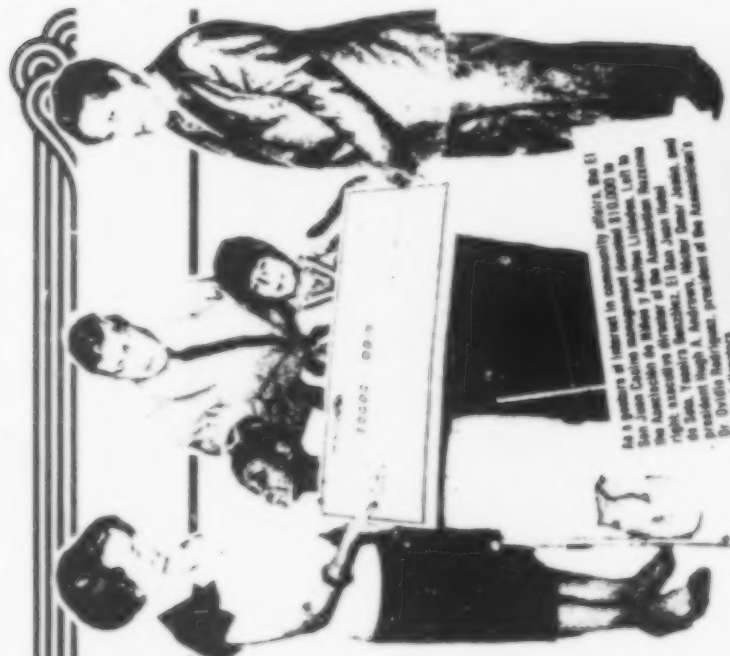
Throughout the Casino, an effect of bustling activity has been achieved by the use of reds. Blues are never used in

casinos because they communicate distance, not are yellows, which are perceived as too informal, said Roselló. At all tables, the lights and chandeliers have been restored to their original splendor, the most dramatic being the huge crystal chandelier in the baccarat area, where exquisite etched windows form a delicate backdrop. Baccarat, or chemin du fer, is traditionally the most elegant and glamorous of all games of chance.

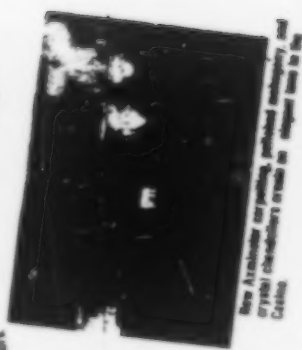
The El San Juan Casino has 35 gaming tables, 2 mini-baccarat, 22 of which are for the game of "21." There are 4 big dice tables, a large baccarat table, six roulette tables, and sundry others, plus 160 slot machines. With one person to each slot machine, plus 240 at the tables, the casino has a capacity of 400 players.

The hotel offers a number of services to its Casino clients, from transportation to the airport to credit on request. Coffee and other non-alcoholic beverages are served at the tables, alcohol is prohibited by law in Puerto Rico's casinos.

Gaming in Puerto Rico is legal for anyone over 18, as compared to 21 in Las Vegas and 20 in Atlantic City. The largest bet allowed by law here is \$4,000 and that only at the largest baccarat game



As a quarter of interest in community affairs, the El San Juan Casino management donated \$10,000 to the American Red Cross. Left to right: Mike Howard, president of the El San Juan Hotel; Mike Howard, vice president of the El San Juan Hotel; Mike Howard, vice president of the El San Juan Hotel; Mike Howard, vice president of the El San Juan Hotel.



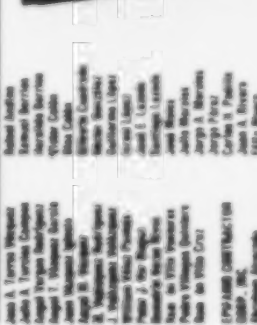
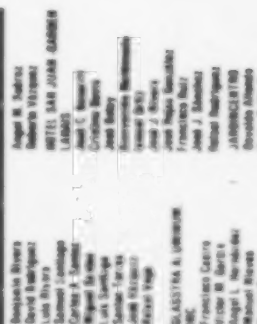
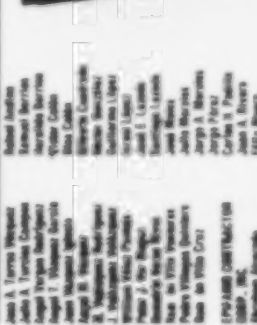
New technology in lighting, polished mahogany, and crystal chandeliers create an elegant look in the Casino.

The maximum for dice, 21, and mini-baccarat is \$2,000, and for roulette \$100. The El San Juan Casino is prepared for customers from all over the world with all forms of money. Many of the staff members speak more than the required English and Spanish, and money changers are available to buy up any currency.

"People travel from all over the world to a gambling destination, and you must position yourself to go after that market," Howard says. "This casino has a unique and magic name in the industry with a beautiful structure like this and 600 feet of beach, what more could you ask?"



Casino employees in a training session.



Appendix D(3).—Secretary of State Certification of  
Authenticity.



ESTADO LIBRE ASOCIADO DE PUERTO RICO  
DEPARTAMENTO DE ESTADO  
SAN JUAN, PUERTO RICO 00904

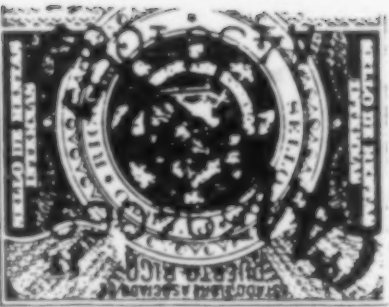
YO, LOURDES I. DE PIERLUISI, Secretaria Auxiliar de Estado  
de Puerto Rico, POR LA PRESENTE CERTIFICO:

Que de acuerdo con los antecedentes obrantes en este Depar-  
tamento, HECTOR RIVERA CRUZ,  
cuya firma aparece en el adjunto documento, era, en la fecha de  
la expedición del mismo, Secretario del Departamento de Justicia  
de Puerto Rico. \_\_\_\_\_

Y CERTIFICO, ADEMÁS, que su firma en el mencionado documento es  
auténtica.

EN TESTIMONIO DE LO CUAL, firmo la presente y estampo  
en ella el Gran Sello del Estado Libre Asociado de  
Puerto Rico, en la Ciudad de San Juan, hoy día

veinticuatro de marzo, A. D.,  
mil novecientos ochenta y seis.



Lourdes I. de Pierluisi  
Secretaria Auxiliar de Estado de  
Puerto Rico

## Appendix D(4).—Translation of State Certification.

(Seal of Puerto Rico)  
COMMONWEALTH OF PUERTO RICO  
Department of State  
San Juan, Puerto Rico 00904

I, LOURDES I. DE PIERLUISI, Assistant Secretary of State of Puerto Rico, HEREBY CERTIFY that pursuant to the data in possession of this Department, Hector Rivera Cruz, whose signature appears on the enclosed document, was, on the date of the issuance of same, Secretary of the Department of Justice of Puerto Rico. I ALSO FURTHER CERTIFY that his signature in the aforementioned document is authentic.

IN WITNESS WHEREOF, I sign and seal this document with the Great Seal of the Commonwealth of Puerto Rico, in the City of San Juan, this twenty fourth of March, A.D. Nineteen Hundred Eighty Six.

(State Clerk's Seal)

(signed) Lourdes I. de Pierluisi  
Assistant Secretary of State  
of Puerto Rico

Internal Revenue Stamp Cancelled (\$3.00)  
Number A4394069

CERTIFIED TO BE A CORRECT  
TRANSLATION FROM ITS ORIGINAL

AIDA TORRES  
Adm. Off. of the US Courts  
Washington, D.C.

WILLIAMS

HOSPITALITY MANAGEMENT CORPORATION

March 25, 1986

Hon. Héctor Rivera Cruz  
Secretary  
Department of Justice  
P.O. Box 192  
San Juan, PR 00902

Hugh A. Andrews  
President

Dear Mr. Rivera Cruz:

Your letter of February 12, 1986, is perhaps the best example of the need to challenge the facial unconstitutionality of Section 8 of the Gaming Act. As applied by Tourism, and now by you, it has yielded the most unreasonable and absurd results, as held by Superior Court Judge Guillermo Arbona.

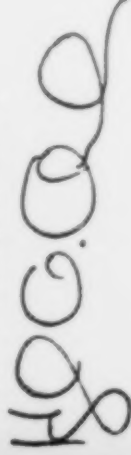
By repeating the same mistake of the first fine imposed by the Tourism Company, at this stage of the proceedings, your warning of criminal prosecution only exacerbates the unconstitutional construction the Government of Puerto Rico continues to give to a ban on truthful information about a legal business which the public of Puerto Rico is entitled to receive, as well as we are entitled to communicate.

The paradox of this case is that all the invalid government intrusions in our free speech rights have never been properly "advertising" cases.

If ever I had any doubt as to the necessity of fighting this case all the way up to the United States Supreme Court, you have provided the right justification. My aim, Mr. Cruz, is not to be able to publish ads addressed to Puerto Ricans to entice them to gamble. My aim is to free the people of Puerto Rico, including myself, from the invalid, discriminating suppression by government of all and any information on legal casinos that denies the most elemental notion of "democracy". When criminal prosecution, and the loss of a casino franchise, are used as the means to silence otherwise legal speech, the statute can never stand constitutional scrutiny if the federal constitutional guarantees are to have any meaning whatsoever.

Please direct your investigator to channel all inquiries for criminal prosecution through my attorney of record in this case.

Respectfully yours,



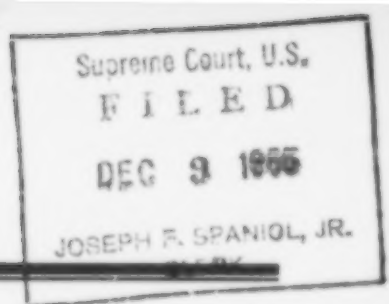
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Appendix E.—Letter to Secretary of Justice, Dated March  
25, 1986.

**AMICUS CURIAE**

**BRIEF**

No. 84-1903



**In the  
Supreme Court of the United States**  
October Term, 1984

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POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a/ CONDADO HOLIDAY INN,

*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO,

*Appellee.*

---

*ON APPEAL FROM THE  
SUPREME COURT OF PUERTO RICO.*

---

**MOTION FOR LEAVE TO FILE AMICUS  
BRIEF BY ASSOCIATION OF  
NATIONAL ADVERTISERS, INC.  
AND AMICUS CURIAE BRIEF  
IN SUPPORT OF APPELLANT.**

---

WEIL, GUTTMAN, DAVIS & MALKIN  
Gilbert H. Weil  
60 East 42nd Street  
New York, New York 10165  
(212) 687-8573  
*Counsel for Amicus,  
Association of National  
Advertisers, Inc.*

December 5, 1985

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BEST AVAILABLE COPY

No. 84-1903

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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1984

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Posadas De Puerto Rico Associates,  
d/b/a/ Condado Holiday Inn,

Appellant,

v.

Tourism Company of Puerto Rico,

Appellee.

On Appeal from the  
Supreme Court of Puerto Rico.

MOTION FOR LEAVE TO FILE AMICUS  
BRIEF BY ASSOCIATION OF  
NATIONAL ADVERTISERS, INC.

The Association of National Advertisers, Inc. ("ANA") is a not-for-profit corporate trade association, organized and existing under the laws of the State of New York, with offices at 155 East 44th Street, New York, New York 10017. It is composed of approximately 400 companies,

with over 2,000 subsidiaries and divisions (many of which are relatively independent advertiser entities). ANA members account for over two-thirds of all national and regional advertising expenditures in the United States.

ANA's fundamental policy has always been to oppose abridgement of advertisers' right to advertise truthfully any product or service that can lawfully be sold. It is concerned that affirmance herein would precedentially detract from advertisers' First Amendment rights.

As shown in the accompanying (eight pages) brief, while ANA agrees with appellant's further arguments, it separately stresses the questions of law applicable to Section 8 of Puerto Rico's Games of Chance Act that are succinctly set forth at page 3 of its brief in the heading for its argument as follows:

Appellee, claiming exemption from

First Amendment prohibition against abridgement of truthful commercial speech, fails to sustain its burden of proving that its restrictive legislation 1) directly advances 2) a substantial governmental interest 3) in the least restrictive manner available.

Appellee's counsel has stated it is not presently in a position to consent to ANA's amicus filing.

Respectfully submitted,  
Weil, Guttman, Davis & Malkin

Gilbert H. Weil / att.

By: . Gilbert H. Weil  
60 East 42nd Street  
New York, New York 10165  
(212) 687-8573  
Counsel for Amicus,  
Association of National  
Advertisers, Inc.

December 5, 1985

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### Laws:

- 15 L.P.R.A. Sec. 78  
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No. 84-1903

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In The  
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Posadas De Puerto Rico Associates,  
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On Appeal from the  
Supreme Court of Puerto Rico.

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AMICUS BRIEF OF  
ASSOCIATION OF NATIONAL ADVERTISERS, INC.  
IN SUPPORT OF APPELLANT.

---

INTEREST OF AMICUS IN APPEAL.

The Association of National Advertisers, Inc. (sometimes "ANA") is a not-for-profit corporate trade association,

organized and existing under the laws of the State of New York, with offices at 155 East 44th Street, New York, New York 10017. It is composed of approximately 400 companies, with over 2,000 subsidiaries and divisions (many of which are relatively independent advertiser entities), located throughout the United States. They sell a wide range of products and services and employ advertising as an important element of their marketing and public relations programs. Although ANA's membership includes many of the nation's largest advertisers, it also comprises a large number of smaller ones. Approximately one-third of ANA members spend under \$5,000,000 annually for advertising. ANA members collectively account for over two-thirds of all national and regional advertising expenditures in the United States.

It has always been a fundamental

policy of ANA to defend against abridgement or erosion of advertisers' right to advertise truthfully any product or service that can lawfully be sold. It is deeply concerned that affirmance of the decision herein of the courts of Puerto Rico would, as a precedent, detract severely from the First Amendment rights of advertisers and the recipient public, so carefully recognized and set forth by this Court in the past decade.

#### ARGUMENT.

Appellee, Claiming Exemption from First Amendment Prohibition against Abridgement of Truthful Commercial Speech, Fails to Sustain Its Burden of Proving that Its Restrictive Legislation  
1) Directly Advances 2) a Substantial Governmental Interest 3) in the Least Restrictive Manner Available.

The parties agree, as does ANA, that this case is governed by the principles established in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980).

Jurisdictional Statement ("JS") of appellant ("Posadas"), pages 16, 20, 21; Motion to Dismiss or to Affirm ("MTD") of appellee ("Tourism Company") in passim.

As Posadas points out at JS 21, these require, where advertising is truthful and for a lawful activity (undisputed here), that governmental abridgement of it must directly advance a substantial state interest in the least restrictive manner needed to do so. Central Hudson, 447 U.S. at 564. Further,

The party seeking to uphold a restriction on commercial speech carries the burden of justifying it.

Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71, n.20 (1983).

The sole claim by Tourism Company of a state interest behind Section 8 of the Games of Chance Act is one of promoting a flow of money into Puerto Rico by encouraging tourists to patronize its casinos - without similarly enchanting Puerto

Ricans to do so, because that would merely circulate, without increasing, Puerto Rican funds within the Commonwealth. MTD 3-7, 16-17.<sup>1</sup>

While there might be a substantial state interest in drawing extraterritorial money into Puerto Rico, it is not the statutory permission to advertise its casinos outside its boundaries that is challenged here. Rather, it is the prohibition against such advertising within Puerto Rico itself which must be justified.<sup>2</sup>

---

<sup>1</sup>While MTD, in its historical recitation, passingly refers to the more customary reasons for restricting gambling (MTD 18-19), its reluctance to rely upon them in this case is understandable. It would generate an unpleasant aroma to assert that it is permissible to seduce "foreigners" into gambling but necessary to protect natives against it; and the lack of such paternalism where other forms of gambling are concerned (JS 18) would also set the stage poorly for its position.

<sup>2</sup>Ambiguously, Section 8 does not literally prohibit advertising within Puerto Rico,

The single reason offered for that abridgement is that advertising-induced gambling at casinos by Puerto Ricans does not benefit Puerto Rico's coffers. But neither does it harm them, so that substantiality of state interest in prohibiting such advertising is hard to find.

Even if there were adverse impact upon Puerto Rico's finances from its natives' gambling, banning internal advertising by its casinos would not directly advance the country's interest.

---

but only "to the public of Puerto Rico". And, beyond advertising, it prohibits casinos to "otherwise offer their facilities" to that public. Does that mean casinos can advertise to non-Puerto Ricans in Puerto Rico? Does not the casinos' mere open door presence in Puerto Rico constitute an unlawful "offer [of] their facilities" to anyone who chooses to walk through those doors, including the Puerto Ricans to whom advertising is forbidden, and non-Puerto Ricans alike if "the public of Puerto Rico" includes everyone within its boundaries? And, for further example, what of Puerto Ricans traveling in the United States?

It is hardly credible that native Puerto Ricans do not know that such long legalized casinos exist, and where. As long as they have that knowledge and a desire to patronize them they will indulge themselves, advertising or no.

The only effective way Puerto Rico could directly advance its interest in the matter would be to bar its residents from entering the casinos at all, as it does for "persons under 18 years of age".  
MTD 20.

And that, collaterally, would provide the least restrictive method of advancing its interest, for it would not abridge advertising at all.

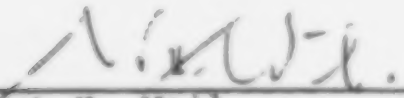
#### CONCLUSION.

Section 8 of the Games of Chance Act of the Commonwealth of Puerto Rico should be declared unconstitutional and the within case remanded to the Supreme Court of Puerto Rico for appropriate action in

accordance with such decision by this Court.

Respectfully submitted,

Weil, Guttman, Davis & Malkin

  
By: Gilbert H. Weil  
60 East 42nd Street,  
New York, New York 10165  
(212) 687-8573  
Counsel for Amicus,  
Association of National  
Advertisers, Inc.

December 5, 1985

**AMICUS CURIAE**

**BRIEF**

**MOTION FILED**

**DEC - 5 1985**

No. 84-1903

4

Supreme Court, U.S.

**FILED**

**DEC 5 1985**

JOHN A. SPANGL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a CONDADO HOLIDAY INN

—v.—

*Appellant,*

TOURISM COMPANY OF PUERTO RICO, et al.,

*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

**MOTION FOR LEAVE TO FILE AND  
BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION**

M. MARGARET MCKEOWN  
PERKINS COIE  
1900 Washington Building  
Seattle, Washington 98101  
(206) 682-8770

*Counsel for Amicus Curiae*  
American Civil Liberties Union

BURT NEUBORNE  
CHARLES S. SIMS  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
132 West 43rd Street  
New York, New York 10036  
(212) 944-9800

*Of Counsel*

**BEST AVAILABLE COPY**

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1985

---

Posadas de Puerto Rico Associates, d/b/a  
Condado Holiday Inn  
Appellant,  
v.  
Tourism Company of Puerto Rico, et al.,  
Appellees.

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On Appeal from the Supreme Court  
Of Puerto Rico

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MOTION FOR LEAVE TO FILE  
BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION

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The American Civil Liberties Union respectfully moves for leave to file the within brief as amicus curiae. Appellant, but not respondents, has consented to the filing of this brief.

The American Civil Liberties Union is a nationwide, non-partisan, non-profit organization of over 250,000 members dedicated to the promotion and defense of

fundamental liberties guaranteed in the Bill of Rights. Foremost among those liberties is freedom of speech protected by the First Amendment. The ACLU has appeared frequently in this Court as counsel and as amicus in many of the significant free speech cases of this century.

This case involves a statute of the Commonwealth of Puerto Rico which impedes the flow of truthful information concerning a lawful activity -- gambling -- by imposing a flat ban on casino or "gambling room" advertising directed to residents of Puerto Rico. Since the statute at issue is transparently designed to use government control over the flow of accurate information as a means of influencing lawful behavior, and since the information ban is discriminatorily applied only to residents of Puerto Rico, amicus believes that the statute violates the First Amendment and the equal

protection clause. Amicus respectfully submits this brief in the hope that it will be of assistance to the Court in resolving the serious constitutional issues posed by the statute. Accordingly, we urge that the Court grant leave to file this brief.

Dated: December 5, 1985

Respectfully submitted,

*M. Margaret McKeown*

M. Margaret McKeown  
Perkins Coie  
1900 Washington Building  
Seattle, Washington 98101  
206/682-8770

Counsel for Amicus Curiae  
American Civil Liberties  
Union

Burt Neuborne  
Charles S. Sims  
American Civil Liberties Union Foundation  
132 West 43rd Street  
New York, New York 10036  
212/944-9800

Of Counsel

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### INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears in the foregoing motion.

### INTRODUCTORY STATEMENT

This case stems from a statute of the Commonwealth of Puerto Rico, known as the "Games of Chance Act," which legalizes certain forms of gambling, but bans advertising by casinos:<sup>1</sup>

Section 8. No gambling room shall be permitted to advertise or otherwise offer their (sic) facilities to the public of Puerto Rico.

In 1948, Puerto Rico lifted its prohibition on gambling and legalized select forms of gaming, including roulette, dice and cards in gambling rooms. Gradually, other forms of gambling were authorized, i.e., state and municipal lotteries, cockfights, horse racing and slot machines, until, today,

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<sup>1</sup> 15 L.P.R.A. §§ 77-84.

only numbers games are outlawed. The 1948 advertising restriction on casinos still survives, however, despite the fact that there is no parallel ban on advertising other games of chance.

The case comes to this Court on appeal from the Supreme Court of Puerto Rico which upheld the constitutionality of the advertising restriction by summarily dismissing for lack of a substantial constitutional question an appeal from a decision of the Superior Court.<sup>2</sup> In upholding the statute, the Superior Court of Puerto Rico found the advertising ban constitutional, but "reformulated" the regulations after finding them "excessively broad" and their application "exceedingly arbitrary and capricious."<sup>3</sup>

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<sup>2</sup> Appendices A and E to Appellant's Jurisdictional Statement ("J.S. Appendix").  
(cont'd next page)

This amicus brief focuses on the Commonwealth's impermissible attempt to deter otherwise lawful conduct through suppression of accurate information and on the discriminatory impact engendered by the statute's application solely to residents of Puerto Rico.<sup>4</sup>

Amicus urges the Court to hold that the Section 8 ban on casino advertising is unconstitutional because (1) it suppresses

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<sup>3</sup> J.S. Appendix B.

<sup>4</sup> While the brief concentrates on these issues, the Court could summarily strike down the statute as both vague and overly broad, and it should not countenance the discriminatory treatment of casino operators versus the preferences accorded operators of other gaming institutions. See Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

The statute's vagueness and overbreadth are highlighted by the lower court's attempt to rewrite the regulations. J.S. Appendix B at 38b-41b. However well-intentioned, these "reformulated" rules only confound the problem. For example, the regulations still impose an unconstitutional prior restraint by requiring advertising to be approved by the Tourism Company. What is and is not permitted in this labyrinth of regulations remains a mystery to all but the most clever wordsmiths.

truthful, nonmisleading speech about a lawful activity under the guise of promoting tourism and regulating gambling; and (2) it unconstitutionally discriminates against residents of Puerto Rico.

#### SUMMARY OF ARGUMENT

Puerto Rico may not seek to manipulate public behavior through a ban on truthful advertising by casinos, which are state-sanctioned, lawful enterprises. Indirect regulation of conduct through restrictions on speech violates the First Amendment.

Even if the test for regulation of commercial speech under Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) were appropriate here, moreover, the statute at issue here would be invalid, since it is not directly related to serving any substantial interest and is far more extensive than necessary.

Finally, Puerto Rico may not, under the First Amendment and the equal protection clause, discriminatorily impose a ban on casino advertising to residents of Puerto Rico when no such restraint exists on the dissemination of identical information to nonresidents.

#### ARGUMENT

The broad scope of Puerto Rico's prohibition, even after its reformation by the court below, leaves little doubt as to what this case does and does not involve. It does not relate to regulation of an illegal activity or false and misleading advertising.<sup>5</sup> Nor can it be viewed as bringing into play a "time, place or manner"

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<sup>5</sup> Compare Pittsburgh Press Company v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) and Zauderer v. Office of Disciplinary Counsel, 471 U.S. \_\_\_, 85 L. Ed. 2d 652 (1985). The Tourism Company concedes that authorized gambling rooms are lawful and assumes that the advertising is not misleading. Appellees' Motion to Dismiss or to Affirm at 16.

restriction.<sup>6</sup> It presents no issues of partial restrictions on speech, such as labeling requirements and warnings or limitations on permissible media for advertising.<sup>7</sup> It is not limited to a single advertising medium.<sup>8</sup> And, it does not involve conflicting constitutional concerns.<sup>9</sup>

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<sup>6</sup> Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 771 (1975).

<sup>7</sup> For example, requirements for labeling and describing foodstuffs and drugs are well accepted, 21 U.S.C. §§301-392 (1976), as are health warnings in the case of cigarettes, 15 U.S.C. §1333 (1984 Supp.). Additionally, presumably because of the special regulatory authority that exists for limited spectrum broadcasting, this Court has upheld a partial restriction uniformly prohibiting broadcast advertising of cigarettes, imposed in light of the availability of such advertising to minors. Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

<sup>8</sup> Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

<sup>9</sup> Regulation of liquor advertising presents different problems because of the powers reserved to the states under the Twenty First Amendment. Capital Cities Cable, Inc. v. Crisp, 467 U.S. \_\_\_, 81 L. Ed. 2d 580 (1984).

Pure and simple, the scheme is a complete ban on truthful advertising within Puerto Rico about a perfectly legal activity. It is an unconstitutional attempt to manipulate public behavior and to regulate the casino industry indirectly through direct restrictions on speech.

I. THE STATUTORY BAN ON TRUTHFUL, NONDECEPTIVE ADVERTISING OF A LEGAL, STATE-SANCTIONED ACTIVITY VIOLATES THE FIRST AMENDMENT.

Where, as here, a complete ban on speech is nothing more than a thinly disguised effort to deter lawful but disfavored conduct, it violates the First Amendment as an impermissible attempt to affect behavior by government-imposed information rationing. This Court has never upheld a blanket prohibition on truthful speech about a lawful activity and it should not do so now.

A careful review of the scant legislative history underlying the statute reveals that the official rationales for the advertising ban -- to promote tourism, to guarantee security for tourists and to increase revenue -- are totally unrelated to the real motive for the ban: to discourage Puerto Ricans from patronizing gambling casinos. The regulatory structure reveals an obvious legislative ambivalence about casino gambling. In 1948, the Puerto Rican legislature legalized gambling casinos for everyone in an effort to increase tourism. However, since the Commonwealth retained serious moral reservations about gambling, it sought, while actively promoting gambling to non-resident tourists, to restrict its own residents from gambling by denying them the same information about gambling that is routinely disseminated to non-residents. The paternalism of this approach, which seeks to

regulate behavior through selective ignorance, is inescapable.

It should be noted that there is no specific legislative history for Section 8<sup>11</sup>; the only guidance is offered in the Statement of Motives of the Games of Chance Act of 1948:

The Purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an

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<sup>11</sup> J.S. Appendix B at 14b.

additional source of income.<sup>12</sup>

Laws of Puerto Rico, 1948, Fourth Regular Session of the Sixteenth Legislature, p.

750. Apparently the lawmakers recognized the social irony of promoting Puerto Rico as a gambling haven for tourists while discouraging residents from participating. When the statute was amended in 1974 to

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<sup>12</sup> The Tourism Company's paraphrasing of this intent is revealing:

The guarantee of security to the tourist cannot be damaged by persons who are not interested in casinos, attracted by publicity oriented towards uncontrolled sponsorship, motivated the legislator to expressly prohibit the advertising of gambling rooms.

The prohibition is intimately related to the governmental public policy of discouraging games of chance in Puerto Rico and authorizing it only as a measure to promote tourism to the Island and not promote it locally.

J.S. Appendix B at 5b.

The suggestion -- advanced in support of the advertising ban here -- that Puerto Ricans must be kept out of the casinos in order to insure the security of tourists is, of course, absurd and cannot be entertained as a serious justification for the ban.

legalize slot machines, the legislature slightly recast its Statement of Motives:

[I]t states as a matter of public policy, that the basis of the tourist attraction to Puerto Rico is and shall continue being its extraordinary natural beauty, with special attention to its beaches, historical places and the charms of its people. Legal gambling at casinos is only an additional and secondary attraction offered to our visitors....

Laws of Puerto Rico, 1974, Part 2, Seventh Legislature Acts and Resolutions of the Fourth Special Session, pp. 489-90.

Puerto Rico's apparent justification for the ban is that casino gambling, while legal, carries with it a certain stigma and evil from which the Commonwealth prefers to protect its citizens, but not others. This is a classic example of what Justice Blackmun pointed out in his concurring opinion in Central Hudson Gas v. Public Service

Commission, 447 U.S. 557, 578 (1980) -- the suppression of speech "in order to influence public conduct through manipulation of the availability of information."

In a long line of cases this Court has continually recognized the value and importance of the free flow of information to consumers.<sup>13</sup> Beginning with Bigelow v. Virginia, 421 U.S. 809 (1975), and expanding the notion the following year in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976), the Court articulated the public interest role in dissemination of commercial information:

[A] consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's

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<sup>13</sup> It is now beyond question that commercial speech -- "which not only serves the economic interest of the speaker, but also assists consumers" -- is protected by the First Amendment from unwarranted government regulation. Central Hudson, 447 U.S. at 561.

most urgent political debate.

....

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

425 U.S. at 763-64. This emphasis continued as the Court extended, in case after case, the public's "right to know" via advertising. See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (legal fees); Carey v. Population Services International, 431 U.S. 678 (1977) (contraceptives); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) (real estate); Central Hudson, *supra* (electric utilities); Bolger v. Young's Drug Product Corporation, 463 U.S. 60 (1983) (contraceptives); and Zauderer v. Office of

Disciplinary Counsel, 471 U.S. \_\_\_, 85 L. Ed. 2d 652 (1985) (legal services).<sup>14</sup>

Restricting the flow of legitimate information with the purpose of effecting a calculated response by the public is nothing short of controlling behavior through the rationing of truthful information. The latter conjures up notions of Orwellian strictures and Kafkaesque results which, fortunately, this Court has never sanctioned.

This case is closely akin to Bigelow v. Virginia, where the Court invalidated a Virginia ban on advertising concerning the availability of legal abortion clinics in New York. That Virginia outlawed such clinics was deemed irrelevant to the First Amendment analysis. Virginia could not control the

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<sup>14</sup> The societal interest in access to commercial information is in no way diminished by the fact that the subject here is casinos rather than realty, abortion or prescription drugs. Linmark Associates, 431 U.S. at 92.

actions of its residents by restricting their access to information about legal abortion. It follows that Puerto Rico may not control the actions of its residents by restricting their access to information about gambling which is legal in Puerto Rico. In Bigelow, part of the advertisement read: "ABORTIONS ARE NOW LEGAL IN NEW YORK. THERE ARE NO RESIDENCY REQUIREMENTS." Extending the wording to this case, the advertisement might read: "GAMBLING CASINOS ARE LEGAL IN PUERTO RICO. THERE ARE NO RESIDENCY REQUIREMENTS." Since, under Bigelow, New York clearly could not prohibit advertising about legal casinos in Puerto Rico, it would be anachronistic and bizarre to permit Puerto Rico to prohibit advertising in Puerto Rico about legal casinos in Puerto Rico.

Following Bigelow, in 1977 the Court on two occasions invalidated government attempts to influence public response by restricting

advertising.

Seeking to discourage promiscuity, New York banned contraceptive advertising. Carey v. Population Services, 431 U.S. 678 (1977). In a similarly well intentioned move, a township forbade "For Sale" signs on real estate in an effort to forestall panic selling motivated by racial purposes. Linmark Associates, 431 U.S. 85 (1977). The Court rejected the notion advanced in both cases that advertising may be curtailed because of a fear that the information may produce "detrimental" results:

After Virginia Pharmacy Bd. it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is "detrimental."

.....

[T]he ordinance under review here which impairs "the flow of truthful and legitimate commercial information" is constitutionally infirm.

Linmark Associates, 431 U.S. at 92 n. 6 and

98.

This antipathy toward regulation of conduct through suppression of speech is most clearly articulated by Justice Blackmun's concurrence in Central Hudson:

The court recognizes that we have never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised. (Citation omitted.) Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated.<sup>15</sup>

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<sup>15</sup> The Court made the same point, at 556 n. 9:  
We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances a ban on speech could screen from public view the underlying governmental policy. (Citation omitted) Indeed, in recent years, this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the state to "dampen" demand for or use of the product. Even though "commercial speech" is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the state to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.

447 U.S. at 574-75. Putting commercial speech into an appropriate context, Justice Blackmun goes on to say that

[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information.

447 U.S. at 578.

The Puerto Rico ban falls squarely within the "covert attempt" referred to by Justice Blackmun. Suppression of advertising within Puerto Rico is not regulation of

speech incidental to or in support of a regulated industry. Rather, it is indirect regulation of the industry under the guise of regulation of speech. It is classic suppression of speech "to pursue a nonspeech-related policy." Central Hudson at 556 n. 9. In such instances, the government may not abridge speech absent a compelling reason. To its credit, Puerto Rico does not even attempt to advance a compelling justification for its actions, arguing only that it "is a reasonable advertising ban that directly advances the purpose of discouraging the flowing of the public of Puerto Rico into gambling rooms...."<sup>16</sup>

Indeed, the government's underlying policy -- to keep residents of Puerto Rico out of the casinos -- is cleverly masked by the regulatory scheme. The government does

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<sup>16</sup> Appellees' Motion to Dismiss or to Affirm at 17.

indirectly what it refuses to do directly: prohibit its citizens from gambling within its borders. This "highly paternalistic" approach should be rejected by the Court. The Constitution mandates the government to regulate the conduct, not the speech.

Under its broad police powers, the government has wide latitude to regulate gambling. The Commonwealth should achieve its objectives through direct action, e.g., 1) legislation to restrict gambling; 2) pricing policies; 3) taxation; 4) regulation of casinos' operations; 5) enhanced security; 6) informational advertising calculated to persuade residents to spend money elsewhere and 7) promotional advertising calculated to attract tourists.<sup>17</sup> The state

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<sup>17</sup> This direct action approach is urged by Justice Blackmun in Central Hudson, 447 U.S. at 579, and noted by several commentators: Neuborne, "A Rationale for Protecting and Regulating Commercial Speech," 46 Brooklyn L. Rev. 437 (1980) and Jackson and Jeffries, "Commercial Speech: Economic Due Process and the (cont'd next page)

should be in the business of regulating gambling not speech. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone...." NAACP v. Button, 371 U.S. 415, 438 (1963).

Cases, treatises and law review articles abound with First Amendment analyses discussing the "marketplace of ideas." It would stand every principle of the "marketplace of ideas" on its head if Puerto Rico were permitted to use the suppression of ideas to regulate the marketplace.

II. **THE BAN ON ADVERTISING -- WHICH IS CALCULATED TO DETER GAMBLING THROUGH RESTRICTIONS ON FREE SPEECH -- VIOLATES THE STANDARDS OF CENTRAL HUDSON.**

In Central Hudson the Court set down a

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First Amendment," 65 Va. L. Rev. 1 (1979). Whether Puerto Rico might adopt the most direct measure -- prohibiting only its citizens from gambling in Puerto Rican casinos -- is a question not presented here. See also n. 24 infra.

four-part analysis for commercial speech:

- 1) Is the speech protected by the First Amendment; i.e. nonmisleading and related to lawful activity?
- 2) Is the governmental interest substantial?
- 3) Does the regulation directly advance the asserted governmental interest?
- 4) Is the regulation more extensive than necessary to serve that interest?

447 U.S. at 566. Although amicus believes that Justice Blackmun's concurrence in Central Hudson, drawn from the Court's approach in Bigelow v. Virginia, is the more direct and appropriate response to a government attempt to regulate through enforced ignorance, it is clear that the advertising ban is unconstitutional even under the plurality's analysis in Central Hudson.

Puerto Rico acknowledges that the advertising satisfies the first part of the

test, being nonmisleading and concerning a lawful activity. And, while development of tourism and additional revenues may be substantial governmental interests, it is not at all clear that "discouraging the flowing of the public of Puerto Rico into the gaming rooms" is a "substantial" a governmental goal as Puerto Rico so glibly asserts.<sup>18</sup> How can the Commonwealth legalize gambling and promote gaming rooms to nonresidents, but seek to protect its citizens from their alleged evils? Similarly, how can Puerto Rico inundate its residents with advertising about other forms of gambling but restrict

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<sup>18</sup> Appellees' Motion to Dismiss or to Affirm at 16. The exact rationale behind this claim is never made clear. Apparently Puerto Rico wants to discourage games of chance, to keep out undesirable security risks, i.e. Puerto Ricans, and to encourage its citizens (but not other Americans) to obtain (and retain) income based on work. Id. at 7.

their information on casinos?<sup>19</sup> And finally, how can Puerto Rico legitimately claim that the flow of its own residents to casinos presents a security threat to tourists? The fact that Puerto Rico offers no legitimate justification for these claims underscores the lack of any substantial interest.

Even more troubling is the relationship between the regulation and the asserted interest. Banning advertising within Puerto Rico does not advance tourism or increase revenues. In fact, it has no relationship to those goals and in all likelihood it has a negative effect.<sup>20</sup> And, the Commonwealth's

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<sup>19</sup> The government-sponsored lottery not only advertises directly to Puerto Ricans but affirmatively encourages them to "gamble and win." See J.S. Appendix B at 24b.

<sup>20</sup> As the lower court judge noted:  
The legislative prohibition of not announcing the casinos in Puerto Rico has prevented the casinos from reaching millions of tourists who arrive in Puerto Rico, since they cannot place announcements in mass means of communication....

(cont'd next page)

paternalistic concern for its citizens "does not provide a constitutionally adequate reason for restricting protected speech."

Central Hudson, 447 U.S. at 569. The link between casino advertising in Puerto Rico and the state's concern over stimulating its citizens to "work for a living" is totally remote and tenuous. Equally preposterous is the claim that keeping Puerto Ricans out of casinos by banning advertising advances a government interest because "the flowing of the public of Puerto Rico into the gambling rooms does not contribute to the development of tourism because ... the people of Puerto Rico are not tourists in Puerto Rico."<sup>21</sup>

Finally, the complete ban on advertising is more Draconian than necessary to advance the state's interests. (See discussion of

---

J.S. Appendix B at 23b.

<sup>21</sup> Appellees' Motion to Dismiss or to Affirm at 7 and 17.

regulatory alternatives ante at 20). The statute, as construed by the court below, bans all advertising within Puerto Rico, promotional, informational or otherwise, regardless of the impact on tourism or Puerto Ricans. But Puerto Rico does not claim that a more limited restriction on advertising or an alternative regulatory approach would not adequately advance its interests. The burden is on the state to make this showing and, in its absence, a ban which completely suppresses advertising must be held unconstitutional. Central Hudson, 477 U.S. at 571.

III. THE DISCRIMINATORY RESIDENCE CLASSIFICATION VIOLATES FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT AND THE EQUAL PROTECTION GUARANTEE.

The advertising ban in Section 8 of Puerto Rico's Games of Chance Act prohibits advertising "to the public of Puerto Rico" and, as construed, permits advertising to all others. The statute discriminates against

citizens of Puerto Rico by denying them access to truthful information about a lawful public accommodation. This classification violates both the First Amendment and the equal protection guarantee.<sup>22</sup>

The First Amendment principle which condemns discrimination among different classes of speakers applies with equal force to discrimination among different classes of listeners. In Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), the Court struck down a policy which exempted labor picketing from a general prohibition on picketing on sidewalks abutting schools. Invalidating the ban under the First Amendment and the equal protection clause, the Court focused on the discrimination among different users:

---

<sup>22</sup> The Court has not decided whether the equal - protection guarantee for Puerto Rico is based on the Fifth or the Fourteenth Amendments. See Torres v. Puerto Rico, 442 U.S. 465, 369-70 (1979).

There is an "equality of status in the field of ideas," and government must afford all points of view for equal opportunity to be heard. Once a forum is opened up to assembly, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

....

Guided by these principles, we have frequently condemned such discrimination among different users of the same freedom for expression.

408 U.S. at 96.

Equality among listeners is a necessary corollary of equality among speakers. The statute at issue upsets that equality by creating two classes of listeners: Puerto Ricans and all others. As recognized in Virginia Pharmacy, 425 U.S. at 757: "[I]f there is a right to advertise, there is a reciprocal right to receive the advertising...." A similar First Amendment right to "receive information and ideas" was earlier recognized in Kleindienst v. Mandel:

[T]he First Amendment protects a process ... The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion.

408 U.S. 753, 775 (1972) (Marshall, J., dissenting).

A paternalistic view towards its own citizens results in Puerto Rico discriminating against Puerto Ricans. While tourists and nonresidents are free to receive information about casinos, Puerto Ricans are deprived of truthful advertising about lawful commercial enterprises which operate in their own backyards. Thus, for example, a straightforward, truthful advertisement may appear in "Que Pasa", the official tourist guide to Puerto Rico, but may not appear in a Puerto Rican newspaper or on television.<sup>23</sup>

---

<sup>23</sup> The validity of any ban on television advertising, which is regulated by preemptive Federal Communications Commission rules, is questionable. Capital Cities Cable, 467 U.S. \_\_\_, 81 L. Ed. 2d 580.

See Appendix A for illustrative advertisements.

It is doubtful whether a state could constitutionally pass a law opening the casinos only to nonresidents that state. It follows that Puerto Rico should not be permitted to enforce an advertising ban which is motivated by a desire to reach the same result indirectly.<sup>24</sup> Similarly, a state

---

<sup>24</sup> The regulation is, in some senses, so illogical as to defy traditional analysis. In effect, it presents a "reverse" privileges and immunities case. (By statute, Puerto Rico is deemed a state for purposes of the privileges and immunities clause. See 48 U.S.C. § 737 (note following on repeal); P.L. 81-600, 64 Stat. 320, § 5(1)). Under Article IV, Section 2 of the Constitution,

[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

While the clause is typically applied to remedy discrimination against nonresidents, e.g. Hicklin v. Orbeck, 437 U.S. 518 (1978) (preferential hire statute in Alaska), the language is certainly broad enough to invalidate the residency classification at issue here. Under this approach, schemes which "use residence-discriminatory means to accomplish otherwise permissible ends" are subject to "a virtually per se rule of invalidity." Varat, "State Citizenship and Interstate Equality," 48 U. Chi. L. Rev. 487, 503 (1981).

could not constitutionally pass a law banning advertising to nonresidents. It follows that Puerto Rico should not be permitted to pass a law banning advertising to residents.

Classifications which impinge on a fundamental right, such as freedom of speech, are presumptively invidious and can only be upheld for compelling reasons.<sup>25</sup> Plyer v. Doe, 457 U.S. 202, 216 (1982). Puerto Rico's proffered "protectionism" for its citizens cannot be sustained as a legitimate interest and certainly not a substantial or a compelling one. Where, as here, First Amendment rights are at stake, the equal protection clause dictates invalidation of

---

<sup>25</sup> A further, and very troubling ground, for scrutiny of the classification emerges from a between-the-lines reading of the legislative history and the Tourism Company's Motion to Dismiss or to Affirm. It is possible that Puerto Rico seeks to exclude its citizens from the casinos because of a fear that tourists will not want to mix with Puerto Ricans. Discrimination rooted in national origin is simply illegal under these circumstances.

discrimination against the free speech rights  
of Puerto Ricans.

### CONCLUSION

For the foregoing reasons, the Court  
should reverse the judgment below and hold  
Puerto Rico's advertising ban  
unconstitutional under the First Amendment  
and the equal protection guarantee.

Respectfully submitted,

*M. Margaret McKeown*

M. Margaret McKeown  
Perkins Coie  
1900 Washington Building  
Seattle, Washington 98101  
206/682-8770

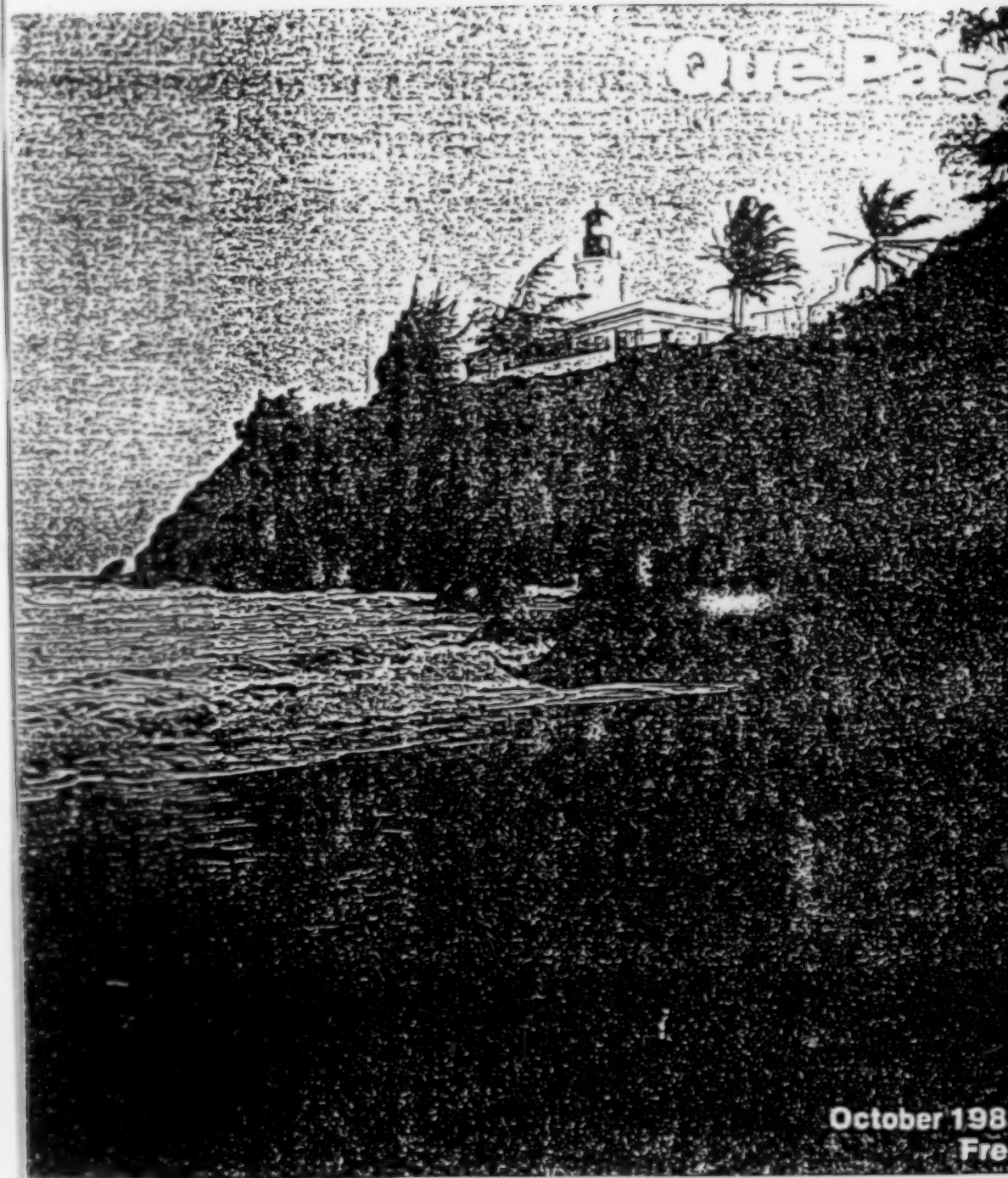
Counsel for Amicus Curiae  
American Civil Liberties  
Union

Burt Neuborne  
Charles S. Sims  
American Civil Liberties Union Foundation  
132 West 43rd Street  
New York, New York 10036  
212/944-9800

Of Counsel

December 5, 1985

Appendix A - Advertising Excerpts  
- from "Que Pasa," Official -  
Visitors Guide to Puerto Rico -



Que Pas

October 198  
Fre



Experience the legendary elegance of a bygone era at the Condado Beach

## El Casino

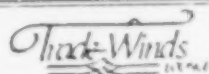
Enjoy San Juan's most elegant casino where for decades fortunes have been won and lost by the famous and infamous alike. In an atmosphere reminiscent of the fabulous 20's, El Casino dates you to try your luck at the slot machines, roulette, black jack, craps and Baccarat tables. Feeling hot? Tonight's the night!

"1919"

Honoring the date the Condado Vanderbilt Hotel was inaugurated the 1919 Piano Bar is San Juan's most exclusive showplace offering the best live local talent on Cote d'Azur nights. The 1919 is Rendezvous, Beauvilliers, music, theater, champagne, a bubbling event in San Juan.



For those who take their dining out seriously, the lavishly appointed El Gobernador restaurant boasts a regal dining area with an impressive view of the Atlantic Ocean. Savor the exquisite European haute cuisine prepared by our Chef. Choose from a scintillating variety of European, Continental and Puerto Rican dishes. For fine dining, it's El Gobernador restaurant. Reservations suggested.



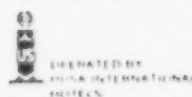
Whether you are in the company of friends or with someone special, the Trade Winds Lounge, with its intimate and tropical environment, offers an ideal blend of comfort and good taste. Here the music is soft and the ocean view is fabulous!



In a Spanish brick patio, amongst palm trees and flowers, we have created a European café for informal meals. Dotted with parasol covered tables, El Café entices you to spend leisurely time in a relaxed indoor outdoor atmosphere. The bar specializes in all the exotic latin drinks and is open from 7:00 a.m. to 1:00 a.m.

# Hotel Condado Beach

Ashford Avenue, Condado, Puerto Rico 00905 • Tel. (809) 721 6080, Ext. 1580 and 1581



## Qué Pasa

Official Visitors Guide to Puerto Rico



November 1985  
Free



### ***A Fiesta Fantástica***

*Pulsate to the Latin rhythms of Latin Fever, the newest and brightest revue in town featuring fascinating and funny novelty acts plus a bounty of beautiful girls. And that's not all! At the Condado Plaza Hotel & Casino, Puerto Rico's Dining and Entertainment Center, you can also enjoy...*

#### **LA POSADA**

By day a charming restaurant with breathtaking ocean view. At night a candle-lit steak house with piano bar and lite bite menu till 4 a.m.

#### **CAPRICCIO**

##### **ITALIAN RESTAURANT**

The best homemade pasta west of Rome.

#### **LOTUS FLOWER**

A romantic setting for the most exquisite Chinese cuisine.

#### **LA FIESTA LOUNGE**

Where San Juan's happy people enjoy non-stop dancing nightly.

**CONDADO PLAZA**  
HOTEL & CASINO  
SAN JUAN, PUERTO RICO

#### **ISADORA DISCO**

San Juan's most dashing discotheque.

#### **LA CANTINA**

Cocktail lounge with a magnificent ocean view.

#### **LAS PALMAS BAR & GRILL**

Poolside bar and self-service restaurant.

*Performances and dinner shows nightly, except Monday, at 10 p.m. Two shows Tuesday and Wednesday at 9:15 and 11:15. For reservations 721-1000 ext. 1090*

**AMICUS CURIAE**

**BRIEF**

MOTION FILED  
DEC 11 1985

No. 84-1903

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

---

POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a CONDADO HOLIDAY INN,

*Appellant,*

—v.—

TOURISM COMPANY OF PUERTO RICO, et al.,

*Appellees.*

---

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

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**MOTION OF THE AMERICAN ASSOCIATION OF  
ADVERTISING AGENCIES, INC. FOR LEAVE TO  
FILE A BRIEF AS AMICUS CURIAE**

---

David S. Versfelt\*  
C. Evan Stewart\*  
DONOVAN LEISURE NEWTON & IRVINE  
30 Rockefeller Plaza  
New York, New York 10112  
(212) 307-4100

*Attorneys for the American  
Association of Advertising Agencies, Inc.*

*\* Counsel of Record*

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**BEST AVAILABLE COPY**

No. 84-1903

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IN THE  
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**MOTION OF THE AMERICAN ASSOCIATION OF  
ADVERTISING AGENCIES, INC. FOR LEAVE TO  
FILE A BRIEF AS AMICUS CURIAE**

The American Association of Advertising Agencies, Inc. ("A.A.A.A."), pursuant to this Court's Rule 36.3, respectfully moves for leave to file a brief as *amicus curiae* in support of the Appellant, urging that the judgment of the Supreme Court of the Commonwealth of Puerto Rico be reversed. In accordance with Rule 36.3, this motion is accompanied by the A.A.A.A.'s proposed brief.

### Interest of the A.A.A.A.

The A.A.A.A. seeks to submit an *amicus curiae* brief in this appeal because it is a fundamental policy of the A.A.A.A. to defend against any abridgement or erosion of the right to advertise truthfully any product or service which may be lawfully provided to the public. The decision of the Supreme Court of Puerto Rico is of paramount concern to the A.A.A.A. and its members because it judicially sanctions complete suppression of a type of constitutionally protected commercial speech.

The A.A.A.A. is the national association of the advertising agency business. Its members include more than 700 advertising agencies located throughout the United States, with more than ten of its members having offices within the Commonwealth of Puerto Rico. A.A.A.A. agencies handle in excess of three-fourths of all national advertising placed by advertising agencies, as well as a substantial amount of local retail and regional advertising.

Members of the A.A.A.A. are experts in communicating with the public at large. They design advertising campaigns, creating and placing advertisements on behalf of clients who, for the most part, are businesses selling goods and services to the public. The A.A.A.A. and its members therefore have a direct and continuing interest in any judicial or legislative determination which would affect the right of advertisers and their agencies to communicate with the public.

The constitutional right of free expression is a critical component of our nation's liberties. It should not lightly be restricted, even in seemingly minor ways, not only because of the direct injury to free speech in the particular context, but also because judicial sanction of suppression in one context could pave the way for assaults on speech in others. This is the paramount interest of the A.A.A.A. in this appeal.

### Desirability of an Amicus Curiae Brief

The accompanying *amicus curiae* brief is devoted entirely to the question whether the Commonwealth of Puerto Rico may, consistent with the First Amendment, impose an absolute ban upon truthful and accurate advertising of an entirely lawful commercial activity. The A.A.A.A. takes the position that Puerto Rico's complete suppression of such advertising violates the First Amendment and is directly contrary to the prior holdings of this Court. We respectfully suggest that on a constitutional issue of such gravity it is desirable for the Court to receive the views of a nationwide organization whose members' very existence depends on the preservation of their freedom to speak.

Respectfully submitted,

DONOVAN LEISURE NEWTON & IRVINE

By C. EVAN STEWART

David S. Versfelt  
C. Evan Stewart

30 Rockefeller Plaza  
New York, New York 10112  
(212) 307-4100

*Attorneys for the American  
Association of Advertising  
Agencies, Inc.*

Dated: December 11, 1985

**AMICUS CURIAE**

**BRIEF**

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Supreme Court, U.S.  
**FILED**

**DEC 11 1985**

JOSEPH F. SPANIOL, JR.  
CLERK

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ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

**BRIEF OF THE AMERICAN ASSOCIATION OF  
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AS AMICUS CURIAE**

David S. Versfelt\*

C. Evan Stewart\*

DONOVAN LEISURE NEWTON & IRVINE

30 Rockefeller Plaza

New York, New York 10112

(212) 307-4100

*Attorneys for Amicus Curiae  
the American Association of  
Advertising Agencies, Inc.*

*\* Counsel of Record*

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**QUESTION PRESENTED**

Whether the Commonwealth of Puerto Rico may, consistent with the First Amendment, impose an absolute ban upon truthful and accurate advertising of an entirely lawful commercial activity?

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---

**Interest of Amicus Curiae**

The American Association of Advertising Agencies, Inc. ("A.A.A.A.") submits this brief as *amicus curiae* in support of the Appellant, urging that the judgment of the Supreme Court of the Commonwealth of Puerto Rico be reversed. The A.A.A.A. strongly believes that the First Amendment protects the right to advertise truthfully any product or service which may be lawfully provided to the public. The decision of the Supreme Court of Puerto Rico is of paramount concern to the A.A.A.A. and its members because it judicially sanctions

complete suppression of a type of constitutionally protected commercial speech.

The A.A.A.A. is the national association of the advertising agency business. Its members include more than 700 advertising agencies located throughout the United States, with more than ten of its members having offices within the Commonwealth of Puerto Rico. A.A.A.A. agencies handle in excess of three-fourths of all national advertising placed by advertising agencies, as well as a substantial amount of local retail and regional advertising.

Members of the A.A.A.A. are experts in communicating with the public at large. They design advertising campaigns, creating and placing advertisements on behalf of clients who, for the most part, are businesses selling goods and services to the public. The A.A.A.A. and its members therefore have a direct and continuing interest in any judicial or legislative determination which would affect the right of advertisers and their agencies to communicate with the public.

If the Supreme Court of Puerto Rico's decision were to be upheld, the precedent might prompt other States to prevent their citizens from obtaining the advantages of accurate and truthful advertising of activities which those States specifically sanction. The implications of such a precedent for free expression are at odds with the foremost precepts of this nation:

"So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, *the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.* Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision

making in a democracy, we could not say that the free flow of information does not serve that goal."

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (emphasis added; citations omitted).

It is a fundamental policy of the A.A.A.A. to defend against any abridgement or erosion of the right of advertisers to speak truthfully to the public about any product or service that the public may lawfully be provided. The A.A.A.A. thus opposes any ban of commercial expression regarding lawful products or services. The constitutional right of free expression is a critical component of our nation's liberties. It should not lightly be restricted, even in seemingly minor ways, not only because of the direct injury to free speech in the particular context, but also because judicial sanction of suppression in one context could pave the way for assaults on speech in others.

### CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The First Amendment to the Constitution of the United States:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Games of Chance Act of the Commonwealth of Puerto Rico, Act 221 of May 15, 1948, as amended (15 L.P.R.A. Section 78):

"No gambling room shall be permitted to advertise or otherwise offer their [sic] facilities to the public of Puerto Rico."

Gaming Regulations, 15 R.R.P.R. Section 76-218 (1957):

"No gambling room shall be permitted to advertise or otherwise offer their [sic] facilities to the public of Puerto Rico."

Gaming Regulations, 15 R.R.P.R. Section 76a-1(7), as amended on May 22, 1971:

"No concessionaire, nor its agents or employees, shall advertise the gambling parlors to the public in Puerto Rico."

### STATEMENT OF THE CASE

Posadas de Puerto Rico Associates ("Posadas") is a partnership originally organized under the laws of Texas and doing business in Puerto Rico under the trade name Condado Holiday Inn Hotel and Sands Casino. In 1975, Posadas received a franchise from the Puerto Rican Department of the Treasury to operate a casino. The Puerto Rican legislature long ago sanctioned such gaming facilities; since 1970 they have been regulated on behalf of the Commonwealth by the Tourism Company of Puerto Rico.

In 1948, the Puerto Rican legislature imposed a complete ban on the advertising of gaming facilities to the Puerto Rican public. Regulations were subsequently promulgated in 1957 and in 1971; they basically reiterated the language of the original statute. As found by the trial court below, the Commonwealth agencies charged with enforcing the advertising ban, first the Puerto Rican Economic Development Administration and later the Tourism Company, did not: (i) define what constituted an advertisement; (ii) define what constituted the public; or (iii) supply guidelines on how to interpret and/or apply the law and regulations (App. B at 27b, ¶¶ 5,6).<sup>1</sup> The Tourism Company, moreover, enforced the law and regulations inconsistently over a number of years, allowing in some contexts advertising which it prohibited in others (App. B at 27b, ¶ 9).

<sup>1</sup> Citations are to the Appendix submitted with Appellant's June 4, 1985 Jurisdictional Statement.

Between 1978 and 1981, Posadas had a number of disputes with the Tourism Company with respect to its advertising and the operation of its casino. More specifically, the government agency challenged: (i) an advertisement taken out by Condado's union; (ii) Condado's letterhead on its stationery; (iii) Condado's listing in a telephone directory; (iv) Condado's promotional brochure for its hotel guests; and (v) an article in a Puerto Rican newspaper reporting on a press conference held by Condado's General Manager. In the midst of these disputes, the Tourism Company explicitly set forth for the first time what it viewed as being encompassed under the comprehensive ban on advertising:

"This prohibition includes the use of the word 'casino' in matchboxes, lighters, envelopes, internal and/or external letterheads, invoices, menus, napkins, brochures, elevators, glasses, plateware, lobbies, banners, flyers, paperholders, pencils, telephone book[s], directories, billboards, or in any dependency of the hotel or object which may be accessible to the public in Puerto Rico." (App. B at 17b)

On March 12, 1982, Posadas filed an action in the Superior Court of Puerto Rico, challenging, *inter alia*, the constitutionality of the statute banning advertisements (The Games of Chance Act of the Commonwealth of Puerto Rico, Act 221 of May 15, 1948, as amended (15 L.P.R.A. Section 78)), and the regulations promulgated thereunder (Gaming Regulations, 15 R.R.P.R. Section 76-218 (1957); Gaming Regulations, 15 R.R.P.R. Section 76a-1(7), as amended on May 22, 1971). The Superior Court, on December 12, 1984, ruled on Posadas' action. The court, noting that it was the prerogative of the Supreme Court of Puerto Rico to decide questions of constitutionality, refused to determine whether the statute was unconstitutional on its face. At the same time, however, and recognizing its "unavoidable responsibility to establish what can be done pursuant to the statute and what cannot be done to prevent a recurrence of this untenable situation" (App. B at

37b), the court struck down the applicable regulations as unconstitutional and itself supplied "guidelines" for the regulation of casino advertising (see App. B at 38b-40b). While aware of the First Amendment issue posed by the statutory ban on advertising (App. B at 34b, ¶ 13), the court declined to address that in its decision.<sup>2</sup>

On March 29, 1985, Posadas appealed to the Supreme Court of the Commonwealth of Puerto Rico. Notwithstanding the Superior Court's statement with respect to the constitutional oversight responsibilities of the Puerto Rican Supreme Court, that court, on February 7, 1985, declined to hear Posadas' appeal on the ground that it did "not present a substantial constitutional question" (App. A at 1a).

Having filed a Notice of Appeal to this Court on March 29, 1985, Posadas, on June 4, 1985, submitted a Jurisdictional Statement seeking review of the decision of the Puerto Rican Supreme Court. Appellees, on September 30, 1985, moved before the Court to dismiss Posadas' appeal or, in the alternative, to affirm the judgment of the Puerto Rican Supreme Court. On October 21, 1985, the Court postponed consideration of the question of jurisdiction, pending review of the case on the merits.

<sup>2</sup> The court's constitutional analysis covered only the due process and equal protection clauses of the Puerto Rican Constitution and the Fifth and Fourteenth Amendments to the Constitution, respectively (see App. B at 35b-37b).

## I.

**PUERTO RICO'S COMPLETE SUPPRESSION OF TRUTHFUL ADVERTISING OF LEGAL GAMING FACILITIES VIOLATES THE FIRST AMENDMENT AND IS DIRECTLY CONTRARY TO THE HOLDINGS OF THIS COURT**

Nearly a decade ago this Court explicitly ruled that advertising is protected by the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Since that decision, commercial speech has been protected from a wide variety of unjustified restrictions. *E.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (contraceptive advertising); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (electric utility advertising); *In re R.M.J.*, 455 U.S. 191 (1982) (attorney advertising); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (contraceptive advertising); *Zauderer v. Office of Disciplinary Counsel*, \_\_\_ U.S. \_\_\_, 105 S. Ct. 2265 (1985) (attorney advertising). As repeatedly confirmed by this Court: "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." *In re R.M.J.*, *supra*, 455 U.S. at 203.

In *Central Hudson Gas & Electric*, *supra*, this Court emphasized the critical distinction between suppression and regulation:

"[I]n recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 447 U.S. at 566 n.9.

The Court's consistent rejection of bans on advertising was elaborated upon by Justice Blackman:

"The Court recognizes that we have never held that commercial speech may be suppressed in order to further

the State's interest in discouraging purchases of the underlying product that is advertised. *Ante*, at 566 n.9. *Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale have been invalidated.*" 447 U.S. at 574 (concurring opinion) (emphasis added).

Accord *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 383 (1978) ("advertising by attorneys may not be subjected to blanket suppression"); *Zauderer v. Office of Disciplinary Counsel*, *supra*, 105 S. Ct. at 2275 (1985). Indeed, in furtherance of its recognition of the First Amendment's applicability to commercial speech, this Court has *never* sustained a blanket ban on truthful commercial speech.

The Puerto Rican statute, and the regulations promulgated thereunder, are unequivocal in their total, content-based suppression of advertising for legal gaming facilities. Indeed, as Appellees boasted in their September 30, 1985 Motion to this Court: "The specific language of the . . . legal provision is crystal clear to a person of ordinary intelligence. It specifically prohibits the advertising of gambling rooms to the people of Puerto Rico" (p. 13). Appellees do not claim that the advertisements themselves are false or misleading in any way, nor do they question that the operation of a casino—specifically sanctioned by the Puerto Rican legislature—is illegal in any way.<sup>3</sup> Their only argument apparently is that the potential impact of gaming advertisements upon the Puerto Rican people who might view them somehow justifies complete suppression.

This Court has already addressed, and rejected, that very argument. In *Virginia State Board of Pharmacy v. Virginia*

<sup>3</sup> Moreover, Appellees do not attempt to, and cannot, justify the advertising prohibition as a mere time, place and manner restriction.

*Citizens Consumer Council, Inc.*, *supra*, a Virginia statute was designed to suppress completely the advertising of prescription drugs. The purpose of that statute was to protect Virginia consumers who, it was thought, might not be sufficiently knowledgeable to make informed decisions when confronted with such advertisements. In rejecting that "highly paternalistic approach,"<sup>4</sup> the Court ruled:

"What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer to this one is in the negative." 425 U.S. at 773.

The Court's analysis, and ultimate determination, can be no different here.

## II.

### APPELLEES CANNOT MEET THEIR HEAVY BURDEN OF DEMONSTRATING THAT A BAN ON TRUTHFUL ADVERTISING OF LEGAL GAMING FACILITIES DIRECTLY ADVANCES A SUBSTANTIAL GOVERNMENTAL INTEREST IN THE LEAST RESTRICTIVE WAY

While conceding that the Puerto Rican law constitutes an absolute ban on truthful advertising of a legislatively-approved activity, Appellees nonetheless contend that the ban is somehow a reasonable restriction. They further contend that they have sustained their heavy constitutional burden merely by pointing to the intent of the Puerto Rican legislature to

<sup>4</sup> 425 U.S. at 770 ("[A]n alternative to this highly paternalistic approach . . . is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."). See also *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) ("[W]e view as dubious any justification that is based on the benefits of public ignorance.").

"discourage" the people of Puerto Rico from frequenting casinos. Notwithstanding such an intention, however, Appellees cannot demonstrate that they satisfy any of the standards set forth in *Central Hudson Gas & Electric, supra*.

A party seeking in any way to regulate, as opposed to ban, truthful commercial speech about a lawful activity must demonstrate: (i) that a "substantial" governmental interest will be served by the restriction; (ii) that the restriction "directly advances" the interest to be served; and (iii) that the restriction is not more restrictive than necessary. *Central Hudson Gas & Electric, supra*, 447 U.S. at 566. Accord *In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Restrictions must be narrowly drawn, and the State may regulate only to the extent regulation furthers the State's substantial interest."); *Zauderer v. Office of Disciplinary Counsel*, \_\_\_ U.S. \_\_\_, 105 S. Ct. 2265, 2275 (1985). Furthermore, the burden upon that party to justify the restriction is a heavy one. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983).

With respect to the governmental interest Appellees purport to assert, the Puerto Rican legislature has legalized casino gaming for resident and tourist alike. It has done so in order to bolster the local economy, with one expressed aim being to entice people from outside Puerto Rico to visit the Commonwealth and spend money in casinos and related facilities. Where Puerto Rico's public policy so clearly authorizes gaming, Appellees' avowed governmental interest in preventing the citizens of Puerto Rico from learning about gaming facilities can hardly be deemed "substantial." See *Bolger v. Youngs Drug Products Corp.*, *supra* (government's interest in prohibiting the mailing of unsolicited contraceptive advertisements was not "substantial" in the face of contrary and substantial individual and societal interests).

Appellees have made no demonstration, moreover, that the ban on advertising "directly advances" any interest in keeping the Puerto Rican public from, or participating in, gaming activities. Unsupported assertions regarding potential impacts

of advertising (see Appellees' September 30, 1985 Motion at 16) hardly sustain their burden under this Court's guidelines. In *Central Hudson Gas & Electric, supra*, the Court rejected just such subjective suppositions as "tenuous" and "highly speculative," ruling that "[s]uch conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising." 447 U.S. at 569. Also instructive is the Court's more recent analysis in *Zauderer v. Office of Disciplinary Counsel, supra*, in which Ohio's contention—that the administrative ease of regulating its ban on attorney advertising directly advanced its interest in protecting against a confused public—was flatly rejected:

"Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. . . . Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising." 105 S. Ct. at 2279-80.

Most importantly, the final constitutional requirement—that the regulation be narrowly tailored to minimize the infringement of First Amendment rights—cannot be demonstrated here. Appellees have made no showing whatsoever that an absolute prohibition is necessary to secure their avowed goal of "protecting" the people of Puerto Rico. See *Central Hudson Gas & Electric, supra*, 447 U.S. at 570. There is no indication

in the record, moreover, of any attempt to try a less restrictive alternative. *In re R.M.J.*, *supra*, 455 U.S. at 206. See also *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541-42 & n.11 (1980). As this Court stated in *Zauderer v. Office of Disciplinary Counsel*, *supra*, in ruling that Ohio's absolute ban on illustrations in attorney advertisement was not the least restrictive available means to protect against the public being misled, manipulated or confused:

"[B]road prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forego the task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations." 105 S. Ct. at 2281.

The absolute ban on commercial speech imposed here goes far beyond any even arguably appropriate means to advance the avowed interest of the Puerto Rican government. Under a straightforward application of the Court's *Central Hudson Gas & Electric* guidelines, Puerto Rico's complete suppression of advertising is, without question, unconstitutional.

## CONCLUSION

Puerto Rico's absolute ban on truthful advertising of a legal activity is a pernicious violation of the First Amendment. The A.A.A.A. respectfully requests that the judgment of the Supreme Court of the Commonwealth of Puerto Rico therefore be reversed.

Respectfully submitted,

David S. Versfelt\*  
C. Evan Stewart\*  
DONOVAN LEISURE NEWTON & IRVINE  
30 Rockefeller Plaza  
New York, New York 10112  
(212) 307-4100

*Attorneys for Amicus Curiae  
the American Association of  
Advertising Agencies, Inc.*

\* *Counsel of Record*

**AMICUS CURIAE**

**BRIEF**

MOTION FILED

DEC 2 1985

No. 84-1903

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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POSADAS DE PUERTO RICO ASSOCIATES, d/b/a  
CONDADO HOLIDAY INN,  
*Appellant,*  
v.

TOURISM COMPANY OF PUERTO RICO, *et al.*,  
*Appellees.*

---

On Appeal from the Supreme Court of Puerto Rico

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MOTION FOR LEAVE TO FILE AND BRIEF OF  
AMERICAN BROADCASTING COMPANIES, INC.,  
CBS INC.,  
NATIONAL ASSOCIATION OF BROADCASTERS, AND  
POST-NEWSWEEK STATIONS, INC.  
AS AMICI CURIAE  
IN SUPPORT OF APPELLANT

---

*Of Counsel:*

EVERETT H. ERLICK  
ROBERT J. KAUFMAN  
AMERICAN BROADCASTING  
COMPANIES, INC.  
1330 Avenue of the Americas  
New York, New York 10019

CARL R. RAMEY  
MCKENNA, WILKINSON  
& KITTNER  
1150 17th Street, N.W.  
Washington, D.C. 20036  
*Counsel for American  
Broadcasting Companies, Inc.*

---

**BEST AVAILABLE COPY**

*Of Counsel:*

HOWARD F. JAECKEL

JOHN W. ZUCKER

CBS INC.

51 West 52 Street

New York, New York 10019

TIMOTHY B. DYK \*

SALLY KATZEN

WILMER, CUTLER & PICKERING

1666 K Street, N.W.

Washington, D.C. 20006

(202) 872-6000

*Counsel for CBS Inc.*

HENRY L. BAUMANN

VALERIE G. SCHULTE

NATIONAL ASSOCIATION OF

BROADCASTERS

1771 N Street, N.W.

Washington, D.C. 20036

*Counsel for National Association  
of Broadcasters*

L. STANLEY PAIGE

Vice President

Legal Affairs

1000 15th Street, N.W.

Washington, D.C. 20071

*Counsel for Post-Newsweek  
Stations, Inc.*

\* Counsel of Record

December 12, 1985

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 84-1903

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POSADAS DE PUERTO RICO ASSOCIATES, d/b/a  
CONDADO HOLIDAY INN,

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Pursuant to Rule 36.3 of the Rules of this Court, Amici American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS"), Post-Newsweek Stations, Inc. ("Post-Newsweek"), and the National Association of Broadcasters ("NAB") hereby move for leave of this Court to file this Brief Amici Curiae in support of appellant, Posadas De Puerto Rico Associates.

The grounds for this motion are as follows:

1. Appellant has granted consent to the filing of this amicus brief, but appellees, the Commonwealth of Puerto Rico and the Tourism Company of Puerto Rico, have declined to grant their consent. Accordingly, this motion is being filed pursuant to Rule 36.3 of the Rules of this Court.

2. This case involves the question of whether Puerto Rico's ban on truthful commercial speech directed at the public of Puerto Rico concerning a lawful activity—casino gambling in Puerto Rico—is invalid under the First Amendment of the United States Constitution.

3. ABC, CBS, and Post-Newsweek are the licensees of various radio and television broadcasting stations. ABC and CBS also operate national broadcast networks. The NAB is a nonprofit incorporated association of radio and television broadcast stations and networks. As of December 9, 1985, NAB's membership included 4,545 radio stations, 880 television stations, and the major nationwide commercial broadcast networks. The stations and networks owned by ABC, CBS, and Post-Newsweek, and those associated with the NAB regularly convey information about and carry commercial advertisements for a wide variety of products and services.

4. Amici believe that the broadcast of truthful advertising for lawful products and services is an important activity protected by the First Amendment. The interests of Amici would be directly affected by any decision that the government of Puerto Rico could constitutionally suppress broadcast commercials within Puerto Rico, or require, as the trial court did in this case, that advertising outside Puerto Rico be submitted to government regulatory authorities for prior approval of its content.

5. This case presents several important issues regarding Puerto Rico's interest in suppressing truthful advertising of casino gambling, and the interests of Amici and

other media in carrying such advertising. Amici expect that appellant will discuss these issues from the perspective of an advertiser. Amici, on the other hand, can bring to this Court the perspective of media entities involved in the publication of commercial advertising. This Court has previously recognized the special interests and perspectives that the media have with respect to restrictions on the publication of commercial advertising. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 828 (1975) (a ban on advertising "incur[s] more serious First Amendment overtones" when it is enforced against the press).

6. In addition, because Amici are media entities, they are directly affected by the requirement of prepublication approval imposed by the trial court on all media carrying advertising for Puerto Rican casinos directed wholly outside Puerto Rico. Indeed, the trial court's opinion which is on review here singled out one of Amici, CBS, in the context of its discussion that broadcast media located outside Puerto Rico are permitted to carry casino advertising subject to the court's requirements of prior restraint. Opinion at 38b-39b. Amici's brief provides this Court with a full discussion of this issue as well.

Accordingly, Amici hereby move this Court for leave to file the following amicus brief in support of appellant.

Respectfully submitted,

*Of Counsel:*

EVERETT H. ERICK  
ROBERT J. KAUFMAN  
AMERICAN BROADCASTING  
COMPANIES, INC.  
1330 Avenue of the Americas  
New York, New York 10019

CARL R. RAMEY  
MCKENNA, WILKINSON  
& KITTNER  
1150 17th Street, N.W.  
Washington, D.C. 20036  
*Counsel for American  
Broadcasting Companies, Inc.*

*Of Counsel:*

HOWARD F. JAECKEL

JOHN-W. ZUCKER

CBS INC.

51 West 52 Street

New York, New York 10019

TIMOTHY B. DYK \*

SALLY KATZEN

WILMER, CUTLER & PICKERING

1666 K Street, N.W.

Washington, D.C. 20006

(202) 872-6000

*Counsel for CBS Inc.*

HENRY L. BAUMANN

VALERIE G. SCHULTE

NATIONAL ASSOCIATION OF

BROADCASTERS

1771 N Street, N.W.

Washington, D.C. 20036

*Counsel for National Association  
of Broadcasters*

L. STANLEY PAIGE

Vice President

Legal Affairs

1000 15th Street, N.W.

Washington, D.C. 20071

*Counsel for Post-Newsweek  
Stations, Inc.*

\* Counsel of Record

December 12, 1985

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On Appeal from the Supreme Court of Puerto Rico

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BRIEF OF  
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POST-NEWSWEEK STATIONS, INC.  
AS AMICI CURIAE  
IN SUPPORT OF APPELLANT

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**INTEREST OF AMICI CURIAE**

American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS"), and Post-Newsweek Stations, Inc. ("Post-Newsweek") are the licensees of various radio and television broadcasting stations. ABC and CBS also operate national broadcast networks. The National Association of Broadcasters ("NAB") is a nonprofit incorporated association of radio and television broadcast stations and net-

works. As of December 9, 1985, NAB's membership included 4,545 radio stations, 880 television stations, and the major nationwide commercial broadcast networks. The stations and networks owned by ABC, CBS, and Post-Newsweek, and those associated with the NAB regularly convey information about and carry commercial advertisements for a wide variety of products and services.

Amici believe that the broadcast of truthful advertising for lawful products and services is a vital activity essential to the healthy functioning of a free press, and the right to broadcast such advertising is protected by the First Amendment. The interests of Amici would be directly affected by any decision that the government of Puerto Rico could constitutionally suppress broadcast commercials within Puerto Rico, or require, as the trial court did in this case, that advertising outside Puerto Rico be submitted to government regulatory authorities for prior approval of its content. Amici are concerned about state or federal restrictions on the broadcast of advertisements for lawful activities, including lotteries.<sup>1</sup> Amici believe that allowing Puerto Rico to suppress commercial advertising of casino gambling would deprive the public of an important source of information in violation of the First Amendment.

## SUMMARY OF ARGUMENT

### I.

Puerto Rico's ban on advertising of casino gambling directed at the public of Puerto Rico is a sweeping attempt to suppress speech about a lawful activity that cannot be squared with the First Amendment. This Court has established that commercial speech, by informing consumers of the availability and nature of lawful products and services, fulfills an important function in a

<sup>1</sup> See, e.g., 18 U.S.C. § 1304 (1982), and regulations promulgated thereunder, 47 C.F.R. § 73.1211 (1984).

democratic society and is therefore entitled to substantial constitutional protection. The state has a substantial burden to bear if it seeks to justify the suppression of speech, a burden that Puerto Rico has not and cannot bear in this case.

In balancing the First Amendment interests in promoting uninhibited commercial speech against a state's interest in restricting such speech, the Court has developed a four-part test. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). First, the speech must concern a lawful activity and not be misleading. Puerto Rico cannot dispute that casino gambling, however controversial, is lawful in Puerto Rico and that the speech sought to be suppressed is neither false nor misleading.

Second, the state must establish that its interest in suppressing speech is substantial. Puerto Rico cannot do so here. The legislative purpose behind the restriction on casino advertising is nowhere articulated. It is not sufficient to rely, as the trial court did, on the fact that the advertising in question does not promote the objectives that the legislature had in mind when it legalized casino gambling. Nor is it sufficient to assert that there are possible adverse effects of gambling on casino patrons from which the Commonwealth wishes to shield its citizens. Since its recognition that commercial speech is protected by the First Amendment, this Court has never sustained a blanket ban on advertising whose purpose was to discourage use of an allegedly harmful but nonetheless lawful product; instead, it has repeatedly invalidated such bans, *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Suppressing speech to discourage use of a lawful product or service disserves not only the interests of those who wish to avail themselves of the product or service; it also disserves the interests of society in promoting full debate about the de-

sirability of permitting the activity. The insubstantiality of a state's interest in permitting an allegedly harmful activity and at the same time banning advertising to its citizens is particularly apparent here. The Commonwealth affirmatively seeks to encourage nonresidents to engage in the supposedly harmful activity; and it permits other games of chance to be advertised to its citizens.

Third, even if Puerto Rico's asserted interest were substantial, the government must still demonstrate a direct and substantial link between its asserted interest and the restriction on speech. At best, there is here only a speculative or tenuous relationship.

The final part of the *Central Hudson* test also is not satisfied. The government must show that the suppression of speech is no more extensive than necessary to further the state's interests. Once again, Puerto Rico has not made such a showing. There are numerous alternatives to suppression of speech available to Puerto Rico, some of which do not affect speech at all and hence are clearly constitutionally preferable.

## II.

The trial court's construction of the statutory ban as requiring prepublication approval of casino advertising directed wholly outside Puerto Rico is an unconstitutional prior restraint. *Near v. Minnesota*, 283 U.S. 697 (1931). There is no asserted state interest to be served by this requirement; indeed, it did not even appear in the statute, but rather came about as a result of the trial court's attempt to construe the statute to avoid any constitutional infirmities. Further, the system established here is an especially condemned form of prior restraint, in that it requires submission of proposed advertising to a government agency, without providing any ascertainable standards or mechanism for prompt judicial review. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

## ARGUMENT

Beginning with *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court has established that commercial speech—including the advertising of lawful activities and products—promotes important First Amendment values and is entitled to substantial constitutional protection. By informing consumers of the availability and nature of lawful products and services, commercial speech fulfills an “indispensable” role in the allocation of resources and in the structuring and functioning of our economy. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).<sup>2</sup> This Court has accordingly rejected the “highly paternalistic” view that government may attempt to shield citizens from perceived problems connected with legally available products and services by forbidding truthful, non-misleading advertising about them. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Rather, it has held that the First Amendment compels government

“to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.” *Id.* at 770.

Thus, this Court has, *inter alia*, invalidated state bans on the advertising of abortion services, *Bigelow v. Virginia*, 421 U.S. 809 (1975); on price advertising by pharmacists, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); on the advertising of contraceptives, *Carey v. Population*

<sup>2</sup> See also *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976).

*Services International*, 431 U.S. 678 (1977); and on advertising by lawyers, *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

# I. PUERTO RICO'S BAN ON CASINO ADVERTISING VIOLATES THE FIRST AMENDMENT.

This case involves Puerto Rico's efforts to ban truthful commercial speech concerning a concededly controversial but nonetheless lawful activity—casino gambling in Puerto Rico—when the advertising is directed at the public of Puerto Rico. Section 8 of the Games of Chance Act was enacted by Puerto Rico in 1948 and, as amended, provides:

"No gambling room shall be permitted to advertise or otherwise offer their [sic] facilities to the public of Puerto Rico."

The trial court below construed Section 8 to read as follows:

"Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos."<sup>2</sup>

The trial court thus construed the ban as applying only to advertisements purchased for consideration and "addressed to inviting the residents of Puerto Rico to visit the casinos";<sup>3</sup> with those limitations it upheld a total ban on advertising, regardless of content. The Supreme Court of Puerto Rico summarily denied an appeal for want of a substantial federal question. Appellant's Jurisdictional Statement, at 1a-2a.

As originally enacted and as construed by the trial court, Section 8 is plainly a content-based blanket sup-

<sup>2</sup> Opinion at 38b. Citations to the trial court's opinion refer to the opinion as attached to appellant's Jurisdictional Statement.

<sup>3</sup> Opinion at 33b, 37b-38b.

pression of advertising of casino gambling within Puerto Rico. The exceptions crafted by the trial court to the broad sweep of the statute—permitting advertising of casinos within tourist hotels, in hotel letterheads, and at points of entry into Puerto Rico—do not allow any meaningful advertising to the public of Puerto Rico.<sup>4</sup> As the Court said in *Virginia State Board of Pharmacy* about a similarly narrow exception to a ban on drug price advertising, "[i]t is clear, nonetheless, that all advertising . . . in the normal sense, is forbidden."<sup>5</sup>

In a series of recent decisions,<sup>7</sup> this Court has used the four-part test developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) for balancing the First Amendment interests in promoting uninhibited, truthful commercial speech about lawful activities against a state's interest in restricting such speech. The Court in *Central Hudson* described that test as follows:

"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted govern-

<sup>4</sup> Although the trial court also excepted from Section 8's prohibition the distribution within Puerto Rico of casino advertising in media originating outside Puerto Rico (subject, however, to prior approval of the content), the restrictions on advertising originating within the jurisdiction and directed at the residents of Puerto Rico nonetheless clearly constitute a "blanket ban" within the decisions of this Court. See also *Bates v. State Bar of Arizona*, 433 U.S. at 383; *Carey v. Population Services International*, 431 U.S. at 702; *Virginia State Board of Pharmacy*, 425 U.S. at 771.

<sup>5</sup> 425 U.S. at 752. The restrictions at issue in *Virginia State Board of Pharmacy* permitted pharmacists to quote prescription drug prices over the telephone. *Id.*

<sup>7</sup> See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. at 2275; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68-69 (1983); *In re R.M.J.*, 455 U.S. 191, 203-04 (1982).

mental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”<sup>8</sup>

Puerto Rico’s ban on the advertising of casino gambling directed at “the public of Puerto Rico” is a sweeping attempt to suppress speech about a lawful activity that cannot be squared with the First Amendment and that does not withstand scrutiny when analyzed under the *Central Hudson* test. The burden is on the Commonwealth to justify such suppression of speech. It is clear from the record here that Puerto Rico has not met and cannot meet its burden. See *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2277 (1985).

**A. The Banned Advertising Concerns a Lawful Activity and Is Not Misleading.**

The commercial speech at issue here is protected under the first part of the *Central Hudson* test since it concerns lawful activity and is not false or inherently misleading. For almost forty years, Puerto Rico has permitted casino gambling, and those casinos are available both to residents of Puerto Rico and to tourists from outside Puerto Rico.<sup>9</sup> Thus, the banned advertising does not depict or propose illegal conduct and cannot “even remotely be characterized as ‘directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.’” *Carey v. Population Services International*, 431 U.S. at 701 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

<sup>8</sup> 447 U.S. at 566. See also *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. at 2275; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68-69 (1983); *In re R.M.J.*, 455 U.S. 191, 203-04 (1982).

<sup>9</sup> The trial court noted that approximately five percent of the persons who play at the casinos are residents of Puerto Rico. Opinion at 22b.

It is also indisputable that the content of the advertising satisfies the first part of *Central Hudson*. On its face, Puerto Rico’s ban is neither limited to nor directed at speech which is false or misleading, but instead sweeps broadly to encompass all advertising for casino gambling that is directed at the public of Puerto Rico.

**B. There Is No Substantial Government Interest in Banning the Advertising in Question.**

There is no legislative history that sets forth the legislature’s purpose in prohibiting the advertising of casino gambling to the people of Puerto Rico.<sup>10</sup> The trial court noted that the section of the statute prohibiting advertising was enacted at the same time that the Puerto Rican legislature amended the Games of Chance Act to legalize casino gambling and that the legislature articulated several purposes for permitting casino gambling, the most important of which were promoting tourism and raising revenues.<sup>11</sup> Similarly, appellees state that “the basic and fundamental purposes of the legislation [were] to promote the development of tourism and at the same time to open to the Treasury of Puerto Rico an additional source of income.”<sup>12</sup> Appellees argue that these purposes are not served by advertising to Puerto Ricans since

“if the public of Puerto Rico is encouraged to go to the gambling rooms it neither contributes to the development of tourism because the people of Puerto

<sup>10</sup> Opinion at 13b-14b.

<sup>11</sup> The trial court concluded:

“The only expression of public policy for the approval of Law 221, which is the one in controversy herein, is that which was made part of the body of the law as its first section, clearly establishing that the reason to legalize those games was to contribute to the promotion of tourism.”

Opinion at 31b; see also Opinion at 13b-14b, 28b-29b.

<sup>12</sup> Motion to Dismiss or Affirm (“Motion”), at 5.

Rico are not tourists in Puerto Rico, nor provides an additional source of income because as a general rule the source of income of the people of Puerto Rico is Puerto Rico itself.”<sup>13</sup>

Notwithstanding that the two sections of the statute were enacted at the same time, the justifications for *permitting* the activity in question provide no basis for *banning* truthful advertising about it. Indeed, as the trial court found, “[t]he legislative prohibition of not announcing the casinos in Puerto Rico has prevented the casinos from reaching millions of tourists who arrive in Puerto Rico,” which has resulted in an “economic crisis” for the hotel industry in Puerto Rico.<sup>14</sup>

The trial court also conjectured that in passing Section 8 in 1948, the Puerto Rican legislature “was worried about the participation of the residents of Puerto Rico [in] what on that date constituted an experiment” and wanted to protect Puerto Ricans from the perceived hazards of casino gambling.<sup>15</sup> Appellees, quoting from the legislative history of amendments to the Slot Machine

<sup>13</sup> *Id.* at 5-6.

<sup>14</sup> Opinion at 23b-24b. The trial court also found that in legalizing casino gambling, the Puerto Rican legislature intended to “grant the tourist the greatest possible guarantees.” *Id.* at 13b. Appellees suggest that the advertising ban furthers this purpose by discouraging “persons who are not interested in casinos” (i.e., who are not interested in gambling), *id.* at 5b (quoting appellees’ Answer to Complaint), from visiting the casinos. Even if it could be shown that this constitutes a substantial state interest, there is no evidence that the advertising ban furthers this interest. For example, there is no showing that Puerto Rican citizens are more likely to attend casinos without gambling than are tourists. Intuitively, the reverse seems likely to be the case, since tourists are more likely to engage in sightseeing activities (including visiting casinos). In any event, there are many less restrictive alternatives for ensuring that tourists visiting casinos are not impeded by the presence of “persons who are not interested” in gambling.

<sup>15</sup> Opinion at 32b.

law passed by the Puerto Rican legislature in 1980 and 1982, surmised that Section 8 was intended to “discourage[e] the flowing of the public of Puerto Rico into the gambling rooms.”<sup>16</sup> But neither the trial court nor appellees were able to identify any of the hazards at which Section 8 was directed, or to determine why the legislature wanted to discourage Puerto Ricans from visiting the casinos.

The trial court and appellees appear to believe that the Commonwealth was concerned about the possible adverse effects of gambling on casino patrons. They therefore assert that the state interest here is an interest in banning the advertising in order to discourage gambling.<sup>17</sup> There is no claim that the advertising itself creates any problem, apart from the problems created by the underlying activity.

This distinction is important because the type of legitimate state interest which could justify a ban on truthful advertising of a lawful product or service is a state interest in banning adverse effects stemming from the advertising itself and not from the product or service being advertised. For example, in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), the Court suggested that restrictions on billboard advertising for commercial products could be justified by a state interest in regulating roadsigns or billboards that are unattractive and likely to cause traffic problems. There was no suggestion that concerns about the underlying products could justify an advertising ban. To the contrary, the Court cited with approval *Virginia Pharmacy*, holding that a ban

<sup>16</sup> Motion at 7, 16-17. The trial court found that the legislative history of the Slot Machine amendments of 1980 and 1982 was not relevant in construing Section 8, and the legislature’s motives in passing those amendments could not be attributed retroactively to the legislature which passed Section 8 more than 30 years earlier. Opinion at 32b.

<sup>17</sup> Opinion at 32b-33b; Motion at 6-7, 13-14, 16-17.

on advertising because of concerns about the underlying product or service was illegitimate.<sup>18</sup> Similarly, in *Friedman v. Rogers*, 440 U.S. 1 (1979), the Court upheld a ban on trade-mark advertising by optometrists, not because of concern about the product, but because of concerns that such advertising would be misleading. Again the Court cited with approval its decisions holding advertising bans unconstitutional where the purpose of the advertising ban was to discourage use of an allegedly harmful but lawful product.<sup>19</sup>

The point here is that—whatever justifications there may be for advertising bans in other contexts—since *Bigelow* this Court has never sustained a blanket ban on advertising whose purpose was to discourage use of an allegedly harmful but lawful product, and this Court has repeatedly invalidated such bans. The decisions of this Court are based upon the proposition that the government's justification for suppressing commercial advertis-

<sup>18</sup> 453 U.S. at 505.

<sup>19</sup> 440 U.S. at 8-9, 16. Another example of such a ban resulting from concerns about advertising may be the federal ban on cigarette commercials which, it has been claimed, are inherently misleading because of the necessarily detrimental effect of smoking on health. In *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *summarily aff'd*, 405 U.S. 1000 (1972), the Court upheld the statute (prohibiting the advertising of cigarettes on radio and television). The *Capital Broadcasting* decision stressed the unique health hazards presented by cigarette advertising and rested on the propositions that commercial speech has negligible First Amendment protection and that the publisher or broadcaster of paid advertising has no First Amendment interest in the advertising itself. 333 F. Supp. at 584-85. The latter propositions were later rejected by this Court in *Bigelow* and *Virginia Pharmacy* and other decisions regarding commercial speech. Whatever the basis for, and vitality of, the *Capital Broadcasting* decision, the Court's summary affirmation in *Capital Broadcasting* has limited precedential impact and must be narrowly confined to its particular facts and issues. See, e.g., *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979).

ing of a lawful product must be grounded in some significant harm associated with the advertising, and not with concerns about the product itself.<sup>20</sup> As this Court said in *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), a ban cannot be justified because of concern "with the substance of the information communicated." *Id.* at 96.

This rule recognizes the insubstantiality of a state's interest in permitting the sale of allegedly harmful products or services and at the same time banning advertising to discourage their use. After all, in almost all instances the state has a ready remedy for any perceived problems—a ban or severe restrictions on the sale or consumption of the product or service itself.<sup>21</sup> See Section D, below. This rule also serves important First

<sup>20</sup> See, e.g., *Bigelow* (abortion advertising cannot be suppressed in order to discourage abortion: state has no legitimate "interest in shielding its citizens from information about [lawful] activities outside [its] borders," 421 U.S. at 827-28); *Virginia Pharmacy* (truthful information about prices of lawfully available products "is not in itself harmful," 425 U.S. at 770, and state may not protect "customer's health," *id.* at 767, by suppressing such information); *Carey* (contraceptive advertising cannot be barred to discourage use of contraceptives by minors: the state's argument that permitting advertising of contraceptives "would legitimize sexual activity of young people" is "classically not [a] justification[] validating the suppression of expression protected by the First Amendment," 431 U.S. at 701).

<sup>21</sup> A different rule may obtain where the state interest advanced by an advertising ban is not the denial of information about a lawful but assertedly harmful product, but rather the conservation of a scarce and vital resource. In such an unusual situation, the state may have a substantial interest in an advertising ban that is not motivated by the "highly paternalistic" goal of "protection based . . . on public ignorance," *Virginia State Board of Pharmacy*, 425 U.S. at 769. Cf. *Central Hudson* (in view of the "country's dependence on energy resources beyond our control," 447 U.S. at 568, and the state's inability to ban energy use, ban on advertising encouraging energy consumption constitutes a substantial interest; ban struck down on other grounds). Such is not the situation here.

Amendment interests that lie at the heart of the commercial speech doctrine—the interests in providing the public with full information concerning the availability of lawful products and services. And this rule also serves the interests of society in promoting full debate about the desirability of permitting the sale of such products or services, since advertising increases knowledge and discussion about the nature and merit of the advertised activity.

Moreover, the asserted state interest in controlling the use of the product or service by suppressing its advertising is particularly insubstantial in this case. At bottom, what Puerto Rico seeks to accomplish is to isolate its citizens from the effects of an activity that it considers unsavory, but not unlawful. It wishes to encourage tourists from outside its jurisdiction to participate in that activity, while discouraging residents of Puerto Rico from doing so.

In analogous contexts, this Court has struck down states' efforts to protect their own citizens and state resources from the harm associated with lawful activities conducted by out-of-state residents.<sup>22</sup> If states have no legitimate basis for erecting barriers to shield their own citizens from the problems created by lawful activities conducted outside the state,<sup>23</sup> there is even less

<sup>22</sup> See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (Court invalidated New Jersey's law prohibiting the importation into New Jersey of solid or liquid waste which originated or was collected outside the state; no state may "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628.); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 676 (1981) (invalidating Iowa's ban on the entry of 65-foot long tractor trailer trucks; a state may not secure the benefits of interstate commerce "while shunting to neighboring states many of the costs associated" with it).

<sup>23</sup> See, e.g., *Bigelow v. Virginia*, 421 U.S. at 827-28 (the state's "interest in shielding its citizens from information about activities

justification for Puerto Rico's attempt to promote an activity that it may consider hazardous, while shunting those hazards on its neighbors and insulating its own citizens from the supposed harm.

The Commonwealth's efforts to deter Puerto Rican citizens from gambling while encouraging tourists to do so is illegitimate for another reason as well. It could scarcely be contended that a state could bar its own citizens from gambling while permitting tourists to gamble.<sup>24</sup> Surely the state cannot assert a legitimate interest in doing indirectly (through the advertising ban) what it could not do directly (by the regulation of gambling).

Finally, Puerto Rico's attempt to single out casino gambling from all other types of permissible gambling (such as lotteries, cockfights, etc.) casts further doubt on the substantiality of the asserted interest. The Commonwealth simply has not explained why it has an interest in banning casino advertising to Puerto Rican citizens while permitting other forms of advertising concerning games of chance.<sup>25</sup>

#### C. Puerto Rico's Restriction Does Not Directly Advance the Asserted Interest.

Even if Puerto Rico's asserted interest were deemed substantial, *Central Hudson* and other decisions of this Court have made clear that invocation of a substantial

outside [its] borders . . . even if understandable, was entitled to little, if any, weight").

<sup>24</sup> Cf. *Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating a scheme for distributing state mineral wealth to residents on the basis of length of residency).

<sup>25</sup> Cf. *Capital Cities Cable Inc. v. Crisp*, 104 S. Ct. 2694, 2709 (1984) (state's selective approach in regulating only some forms of liquor advertising under Twenty-First Amendment casts doubt on substantiality of state's interest).

government interest does not in itself justify an infringement of protected commercial speech.<sup>26</sup> The government must still demonstrate a direct and substantial link between its asserted interest and the restriction on commercial speech. It has not done so.

There is no indication that the legislative purposes underlying the legalization of casino gambling are advanced by restricting casino advertising. Indeed, as already noted (*see* p. 10, *supra*), the ban appears not to advance the two key legislative objectives of the casino law—promoting tourism and increasing government revenues.

Moreover, there is no evidence in this record to establish that a ban on truthful information about casino gambling alleviates any possible hazards associated with that activity. Even if the harm sought to be curbed is defined broadly as the mere use of casinos by Puerto Rican residents, the ban on advertising has not accomplished that result. As the trial court found, even in its most restrictive form, the ban has not effectively insulated Puerto Rico's citizens from information about the availability of casino gambling on the island.<sup>27</sup> Such information is already widely known and, under the guidelines issued by the trial court, will continue to exist in Puerto Rico.<sup>28</sup>

<sup>26</sup> *See, e.g., Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 94 (1977) ("vital goal" of racial integration does not justify ban on "For Sale" signs); *Virginia State Board of Pharmacy*, 425 U.S. at 766 (ban on pharmacists' price advertising invalidated despite "strong interest" in maintaining standards of profession). *See also Bates v. State Bar of Arizona*, 433 U.S. at 368-79.

<sup>27</sup> Opinion at 12b, 22b.

<sup>28</sup> Under the trial court's guidelines, casinos are permitted to advertise (subject to prior content approval) in newspapers, magazines, radio, television, and other media originating outside Puerto Rico; to post advertising in the international airports and at docks

Restrictions on commercial speech with such a "speculative" and "tenuous" relationship to the government's asserted interest cannot be reconciled with the First Amendment.<sup>29</sup> In *Linmark Associates v. Township of Willingboro*, for example, the Court acknowledged that it was "plausible" that the community's ban on "For Sale" signs would reduce panic selling by whites and promote the community's interest in racially integrated housing, 431 U.S. at 96 n.10, but refused to find a sufficiently direct nexus between the ban and the state's interest because no causal relationship had been demonstrated in the record and because there were other, equally plausible interpretations of the ban's effect and of the reasons for whites' departure. *Id.* at 95-96. Similarly, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-74 (1983), the Court invalidated a federal ban on the mailing of contraceptive advertisements because only a "marginal" and "incremental" relationship had been shown between the ban and the state's asserted interest in promoting parents' control over reading materials.<sup>30</sup>

#### D. Puerto Rico's Ban on Casino Advertising Is More Extensive than Necessary To Meet the Asserted Interest.

Puerto Rico's ban also fails to satisfy the fourth part of the *Central Hudson* test, which requires the govern-

where cruise ships arrive; to advertise in magazines circulated within Puerto Rico, if they are principally targeted to tourists rather than residents; to advertise the name of the hotel, including the word "casino," in general circulation Puerto Rican magazines and other media within Puerto Rico, as long as the word "casino" is not used alone; and to advertise the availability of casinos within the hotels in which they are located. Opinion, at 38b-39b.

<sup>29</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 569; *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. at 2276-81.

<sup>30</sup> *See also Bates v. State Bar of Arizona*, 433 U.S. at 375-79; *Virginia State Board of Pharmacy*, 425 U.S. at 766-70.

ment to establish that the suppression of speech "is no more extensive than necessary to further the State's interest."<sup>31</sup> As in *Central Hudson*, no showing has been made that "a more limited restriction . . . would not serve adequately the State's interests."<sup>32</sup>

The alternatives available to Puerto Rico are numerous. It could attempt to solve problems perceived to result from casino gambling by Puerto Ricans by banning casino gambling entirely, as it has done in the past. This alternative, which does not affect speech at all, is clearly constitutionally preferable to a ban on speech. See *Virginia State Board of Pharmacy*, 425 U.S. at 770.

Short of banning the activity altogether, Puerto Rico still could achieve its objectives by more limited restrictions. Whether the Commonwealth's concern over gambling relates to crowd control or pecuniary harm to Puerto Rican casino patrons, there are ample means available to resolve those problems. The Commonwealth could strictly regulate, as it already does, the times, places, and circumstances in which casino gambling is conducted, and it could establish limits on the level of permissible betting. The Commonwealth could also require the posting of warnings at casino doors concerning the hazards of gambling. Such measures would address the problems associated with gambling more directly than an advertising ban and in a manner far more compatible with First Amendment principles—by increasing information available to the public, rather than diminishing it.<sup>33</sup>

<sup>31</sup> 447 U.S. at 569-70.

<sup>32</sup> *Id.* at 570.

<sup>33</sup> See *In re R.M.J.*, 455 U.S. at 205-07; *Linmark Associates v. Township of Willingboro*, 431 U.S. at 97; *Virginia State Board of Pharmacy*, 425 U.S. at 769-70. Cf. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[T]he remedy to be applied is more speech, not enforced silence.").

What Puerto Rico may not do, however, is to sanction an activity within its borders available to residents and tourists alike, and then deny its residents access to truthful information concerning that activity.

## II. THE PRECLEARANCE REQUIREMENT FOR ADVERTISING TO PERSONS OUTSIDE PUERTO RICO VIOLATES THE FIRST AMENDMENT.

Even as to advertisements of the Puerto Rican casinos carried by any "newspapers, magazines, radio, television or any other publicity media" and directed wholly outside Puerto Rico, the trial court required advertisers to submit a draft version of any such advertisement to the Puerto Rican Tourist Company for prior approval.<sup>34</sup> This requirement is not found in the language of the statute; it resulted entirely from the trial court's attempt to construe the statute to avoid any constitutional infirmities. Opinion at 38b-39b.

Yet no decision of this Court has ever sustained such a system of prior censorship for commercial advertising or any other speech.<sup>35</sup> As this Court recognized in *Near v. Minnesota*, 283 U.S. 697 (1931), "it has been generally, if not universally, considered that it is the chief purpose of [the constitutional guarantee of freedom of the press] to prevent previous restraints upon publication."<sup>36</sup>

That a system of prior restraint is repugnant to the First Amendment and therefore is presumptively uncon-

<sup>34</sup> Opinion at 38b.

<sup>35</sup> This is not to suggest that the government cannot, in appropriate circumstances, review commercial speech prior to publication to verify the truthfulness of the statements made and the adequacy of the disclosures contained in the message. See, e.g., 15 U.S.C. §§ 77g-77j (1982) (sale of securities is barred until registration statement has been filed and agency has had an opportunity for review). That is clearly not the situation here.

<sup>36</sup> 283 U.S. at 713.

stitutional has been the unwavering position of the Court ever since *Near*.<sup>37</sup> In *New York Times Co. v. United States (Pentagon Papers Cases)*, 403 U.S. 713 (1971) (*per curiam*), the Court found that even the pressing concerns of national security urged by the government did not justify the imposition of a prior restraint. And in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the Court, noting that prior restraint of publication is "the most serious and the least tolerable infringement on First Amendment rights," *id.* at 559, struck down a restraining order designed to protect Sixth Amendment fair trial rights, making clear that such orders are rarely, if ever, permissible.

The protection against prior restraints exists not simply for historical reasons, but rather because prior restraints uniquely threaten protected expression. As the Court explained in *Nebraska Press*, sanctions imposed after publication are subject to numerous protections, and their impact does not become fully operative until after appellate review. In contrast, a prior restraint

"has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."<sup>38</sup>

Those who might otherwise publish and risk punishment because of their belief that their speech is constitutionally protected may be unwilling to defy the system of prior restraint because the protected nature of the publication

<sup>37</sup> See, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) (injunction imposing prior restraint is "impermissible restraint on First Amendment rights").

<sup>38</sup> 427 U.S. at 559 (citing A. Bickel, *The Morality of Consent* 61 (1975)).

will not be a defense to a prosecution for failure to submit the publication for advance approval.<sup>39</sup>

Repugnant though any prior restraint is to the First Amendment, one that depends on submission of a proposed publication to an official is "especially condemned." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Such an approach in effect "requires that permission to communicate ideas be obtained in advance from . . . officials who judge the content of the words and pictures sought to be communicated." *Id.* It allows the government "to insinuate itself into the editorial rooms of this Nation's press," *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).<sup>40</sup>

The Commonwealth has not justified prior restraint for advertising to persons outside Puerto Rico, much less established the compelling justification that this Court's decisions require. Indeed, the Commonwealth's interest in a system of prior restraint is not even articulated, and seems particularly difficult to justify in view of the general willingness to permit advertising to such persons. As noted above, the requirement of prior approval for advertisements originating outside the jurisdiction was not even contained in the statute. Moreover, even if a system of prior restraints for commercial advertising could ever be justified, the trial court's system is not conceivably valid since there are no ascertainable standards and no provisions for prompt judicial review of the Company's (administrator's) decisions. See *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

<sup>39</sup> See generally Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Probs.* 648 (1955).

<sup>40</sup> Cf. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 391 (1973).

## CONCLUSION

For the reasons stated, Amici Curiae respectfully urge that the Judgment of the Supreme Court of Puerto Rico be reversed.

Respectfully submitted,

*Of Counsel:*

EVERETT H. ERLICK  
ROBERT J. KAUFMAN  
AMERICAN BROADCASTING  
COMPANIES, INC.  
1330 Avenue of the Americas  
New York, New York 10019

HOWARD F. JAECKEL  
JOHN W. ZUCKER  
CBS INC.  
51 West 52 Street  
New York, New York 10019

CARL R. RAMEY  
MCKENNA, WILKINSON  
& KITTNER  
1150 17th Street, N.W.  
Washington, D.C. 20036  
*Counsel for American  
Broadcasting Companies, Inc.*

TIMOTHY B. DYK \*  
SALLY KATZEN  
WILMER, CUTLER & PICKERING  
1666 K Street, N.W.  
Washington, D.C. 20006  
(202) 872-6000

*Counsel for CBS Inc.*

HENRY L. BAUMANN  
VALERIE G. SCHULTE  
NATIONAL ASSOCIATION OF  
BROADCASTERS  
1771 N Street, N.W.  
Washington, D.C. 20036  
*Counsel for National Association  
of Broadcasters*

L. STANLEY PAIGE  
Vice President  
Legal Affairs  
1000 15th Street, N.W.  
Washington, D.C. 20071

*Counsel for Post-Newsweek  
Stations, Inc.*

\* Counsel of Record

December 12, 1985

**AMICUS CURIAE**

**BRIEF**

MOTION FILED  
DEC 12 1985

No. 84-1903

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IN THE  
**Supreme Court of the United States**

October Term, 1985

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POSADAS DE PUERTO RICO ASSOCIATES, d/b/a  
CONDADO HOLIDAY INN,  
*Appellant,*

*v.*

TOURISM COMPANY OF PUERTO RICO, *et al.*,  
*Appellees.*

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On Appeal from the Supreme Court of Puerto Rico

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**MOTION OF ATLANTIC CITY CASINO  
ASSOCIATION FOR LEAVE TO FILE AMICUS  
CURIAE BRIEF AND BRIEF OF ATLANTIC  
CITY CASINO ASSOCIATION AS AMICUS  
CURIAE IN SUPPORT OF APPELLANT**

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HERBERT J. MILLER, JR.  
DAVID O. STEWART  
STEPHEN L. BRAGA  
MILLER, CASSIDY, LARROCA & LEWIN  
2555 M Street, N.W.  
Washington, D.C. 20037  
(202) 293-6400

IN THE  
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On Appeal from the Supreme Court of Puerto Rico

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**MOTION OF ATLANTIC CITY CASINO  
ASSOCIATION FOR LEAVE TO FILE  
BRIEF AS AMICUS CURIAE**

The Atlantic City Casino Association (the "ACCA") respectfully requests that it be granted leave to file the accompanying Brief in this case as *Amicus Curiae* in support of appellant. Neither counsel for appellant Posadas de Puerto Rico Associates nor counsel for appellees has consented to the filing of this Brief.

The ACCA is a not-for-profit corporation of the State of New Jersey. The Association represents all eleven operating casino hotels in Atlantic City, New Jersey. More specifically, its members are: Adamar of New Jersey, Inc.; Bally's Park Place, Inc.; Boardwalk Regency Corporation; Castle Associates, a New Jersey Limited Partnership; Claridge at Park Place, Inc.; Elsinore Shore Associates; GNOC Corp.; Greate Bay Hotel and Casino,

Inc.; Harrah's Associates, a New Jersey General Partnership; Marina Associates, a New Jersey General Partnership; and Resorts International, Inc. ACCA members employ approximately 40,000 persons and in 1984 generated more than \$160,000,000 of tax revenues for the State of New Jersey from the state casino revenue tax alone.<sup>1</sup>

ACCA's members are subject to an extensive system of regulation established by the State of New Jersey, see N.J.S.A. §5:12-1, *et seq.*, and rely upon extensive advertising in various media, including newspapers, billboards, broadcasting, and magazines. Accordingly, the ACCA has a direct interest in the restrictions which constitutionally may be placed on casinos' ability to communicate with the public through advertising and other public announcements. Indeed, one member of the ACCA was threatened with adverse action by the New Jersey Casino Control Commission based upon the fines imposed on appellant in this case. Jurisdictional Statement, p. 19b. The Puerto Rico statute at issue in this case totally destroys the First Amendment rights of publicly licensed casinos. The statute represents an unfortunate example of overreaching regulation which both lacks any rational justification and violates the Constitution.

Because of the ACCA's interest in preserving its members' constitutional right of free speech, it asks this Court to grant this motion for leave to file a brief *amicus curiae* supporting appellant's position that the Puerto Rico statute violates appellant's right to equal protection

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1. This tax revenue figure does not include revenue from state income taxes, sales tax, or property tax on casino-related activity. See Fact Sheet, Atlantic City Casino Association, p. 3 (Nov. 1985). In 1984, the Atlantic City casino hotels paid another \$48,000,000 in local property tax, \$9.3 million in luxury tax, and \$15.2 million in state sales and use taxes. *Id.*

under the First, Fifth, and Fourteenth Amendments and also independently violates the First Amendment.

Respectfully submitted,

HERBERT J. MILLER, JR.  
DAVID O. STEWART  
STEPHEN L. BRAGA  
MILLER, CASSIDY, LARROCA &  
LEWIN  
2555 M Street, N.W.  
Washington, D. C. 20037  
(202) 293-6400

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1985

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No. 84-1903

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POSADAS DE PUERTO RICO ASSOCIATES, d/b/a  
CONDADO HOLIDAY INN,  
*Appellant,*

*v.*

TOURISM COMPANY OF PUERTO RICO, *et al.*  
*Appellees.*

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On Appeal from the Supreme Court of Puerto Rico

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**BRIEF OF ATLANTIC CITY CASINO  
ASSOCIATION AS AMICUS CURIAE  
IN SUPPORT OF APPELLANT**

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**STATEMENT OF INTEREST**

The interest of amici is set forth in the foregoing Motion of Atlantic City Casino Commission For Leave to File *Amicus Curiae* Brief, which is hereby incorporated by reference.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

Because this case concerns a blanket ban on advertising and promotional statements by casinos, it frames with great clarity an important question: In what circumstances, if ever, may government totally silence a particular industry or group? The statute at issue, as translated in the Jurisdictional Statement (p. 4), is

sweeping (Section 8 of the Games of Chance Act of the Commonwealth of Puerto Rico, Act 221 of May 15, 1948, as amended (15 L.P.R.A. §78)):

No gambling room shall be permitted to advertise or otherwise offer their [sic] facilities to the public of Puerto Rico.

This wholesale silencing of publicly-licensed businesses defies and undermines the First Amendment's purpose of ensuring a free flow of information to the public.

This brief will address two issues presented in this case:

*First*, we will demonstrate that Section 8 of the Games of Chance Act denies appellant equal protection of the laws by discriminating against appellant's First Amendment rights solely because of the content of its speech. Whether evaluated under heightened scrutiny for equal protection claims as set forth in *Carey v. Brown*, 447 U.S. 455 (1980), or under the rational relationship analysis set forth in *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249 (1985), the Puerto Rico statute unconstitutionally silences appellant and other casinos. Appellees have offered no reasonable justification for the casino advertising ban. Because Puerto Rico licenses casinos and allows Puerto Ricans to attend those casinos, appellees cannot claim the advertising ban supports a policy of limiting attendance by Puerto Ricans to casinos. No such policy exists. Moreover, in view of Puerto Rico's policy of allowing advertising and public statements concerning other gambling activities such as horse racing, cockfights, and the lottery, appellees' proffered justification for silencing casinos in order to discourage games of chance is totally without force.

*Second*, we will demonstrate that this suit properly presents a facial challenge to Section 8, and that this challenge must be resolved in this Court. The trial court's efforts to rewrite the Commonwealth's gaming

regulations while leaving the statute itself in place cannot salvage the patently unconstitutional statute. Indeed, the trial court's efforts only raised further constitutional issues.<sup>1</sup>

## ARGUMENT

### I.

#### SECTION 8 DENIES APPELLANT EQUAL PROTECTION OF THE LAWS

##### A. Section 8 Cannot Survive Heightened Scrutiny Under The Equal Protection Clause.

This Court held in *Carey v. Brown*, 447 U.S. 455, 461-62 (1980), that "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." This holding followed the conclusion in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), that government "may not select which issues are worth discussing or debating in public facilities." In applying the Equal Protection Clause, the *Mosley* Court insisted (*id.*):

Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

*See Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring); *cf. Consolidated Edison Co. v. Public*

1. We agree with appellant's argument that the Puerto Rico statute is unconstitutional under the First Amendment analysis of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). In view of the lengthy discussion presented by others in this case on that point, we do not discuss it further.

*Service Commission*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic").

Both *Carey v. Brown* and *Mosley* concerned ordinances that prohibited most residential picketing but allowed such picketing in labor disputes. The Court ruled that there has to be a particularly strong showing to justify prohibiting picketing on all but labor-related subjects. Because the ability to speak was conditioned upon the content of the speech — whether the picketing concerned a labor dispute or not — the Court found a violation of equal protection. By comparison, in this case the casinos have been silenced because the content of their speech relates to their business.

*Carey* and *Mosley* cannot be distinguished because they involved access to a public forum to speak on public issues, while this case primarily concerns "commercial speech." This Court has ruled repeatedly that commercial speech is entitled to First Amendment protection, with only one substantial exception: the content of commercial speech may be regulated when such speech is false or misleading or relates to illegal activities. Content-based regulation of commercial speech has been permitted in those circumstances because commercial speakers are uniquely well-suited to know the true facts about the products or services they offer, and because commercial speech is a particularly "hardy breed" of speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, *supra*, 447 U.S. at 564 & n. 6.

The statute here, however, is neither designed to screen false and misleading speech by casinos, nor to require disclosures which protect the public interest in full information, compare *Friedman v. Rogers*, 440 U.S. 1 (1979), nor to suppress advertising related to illegal activity. Compare *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Rather, the

statute suppresses all commercial speech by casinos, while other entities involved in gambling are not so restricted. Thus, like the ordinances in *Mosley* and *Carey*, Section 8 silences one group of speakers while not limiting other speakers, based entirely on the content of each speaker's message. Consequently, the classification of speakers imposed by the Puerto Rico statute must be judged under the demanding standards announced in *Mosley* and *Carey*: It must be "finely tailored" to promote "substantial state interests," and Puerto Rico's justification for suppressing speech must be "carefully scrutinized." *Carey*, *supra*, 447 U.S. at 461-62; *Mosley*, *supra*, 408 U.S. at 99; see *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1122-23 (D.C. Cir. 1978) (*en banc*).

In section 8, Puerto Rico has decreed that licensed casinos shall not advertise or offer themselves to the public of Puerto Rico. That prohibition is based entirely upon the content of the advertising. As articulated by appellees in their Motion to Dismiss or Affirm (p. 11), the purpose of the advertising ban is "to achieve the state's goal of discouraging games of chance in Puerto Rico."

This justification is flatly contradicted in the record. Puerto Rico has authorized the conduct of games of chance by licensing betting on horse races and cockfights and by approving "small betting games (picas) and the lottery." Jurisdictional Statement, p. 35b. Those activities are fully publicized. The record includes the texts and recordings of the advertising used to promote the Puerto Rico lottery, as well as proof of advertising concerning cockfighting and publicity about horse racing. *Id.*, p. 24b. Finally, Puerto Rico has licensed casinos to operate games of chance, and has not excluded the Puerto Rican public from those licensed casinos.<sup>2</sup> As the

2. Compare Bahamas Lotteries and Gaming Act of 1969, §45 (excluding Bahamian citizens from gaming activities at licensed casinos).

trial court noted, "the Puerto Rican legislature does not share the policy of discouraging the use of the slot machines and games of chance . . . ." Jurisdictional Statement, p. 23b.

Even if the proffered justification for banning casino advertising were supported in the record, it could not survive review under the Equal Protection Clause and the First Amendment. As noted in *Central Hudson*, this Court must "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." 447 U.S., at 566 n.9. The Court pointed out that "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Id.*, see *Carey v. Population Services International*, 431 U.S. 678, 700-02 (1977) (state cannot discourage teenage sexual activity by banning advertisement of contraceptives).<sup>3</sup>

3. A content-based restriction of commercial speech was imposed in section 6 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §1335, which bans cigarette advertising on television. That ban was upheld by a 2-1 vote in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), and summarily affirmed, 405 U.S. 1000 (1972). That case did not concern the total suppression of cigarette advertising, however, but only a ban on television commercials. As this Court has held, television is subject to regulation that cannot be imposed on other media. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In addition, *Capital Broadcasting* concerned public health issues and was not brought by the speaker itself, but by broadcasters who had lost no First Amendment rights but only had lost "an ability to collect revenue from others for broadcasting their commercial messages." 333 F. Supp., at 584. Moreover, the plaintiffs in *Capital Broadcasting* presented no equal protection argument, and the case was decided before this Court clarified the constitutional protections for advertising under the commercial speech doctrine. Compare *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, 324-25 (5th Cir. 1983), cert. denied, 104 S.Ct. 3554 (1984) (striking down blanket ban on liquor advertising in Mississippi).

If Puerto Rico truly wishes to prevent public participation in games of chance, there are numerous ways to do so that would not involve suppression of truthful, nondeceptive speech. Having established a casino industry and induced many persons to invest in building that industry, Puerto Rico must respect the constitutional rights of those in the industry and those who might wish to know more about that legally operated industry. The trial court recognized that since a licensed casino is a legal business in Puerto Rico "[i]t is not reasonable to deny their existence, nor is there any reason to hide them. If they are allowed, as they are, they must be allowed to operate commercially in a reasonable manner." Jurisdictional Statement, p. 32b.<sup>4</sup>

Finally, Puerto Rico cannot suppress truthful, nondeceptive casino advertising by claiming that casinos are somehow dangerous or iniquitous places.<sup>5</sup> As the Fifth

4. Appellees have not argued that casinos somehow have waived their First Amendment rights by accepting a casino license subject to the restrictions of Section 8. The granting of a privilege like a casino license may not be conditioned upon the waiver of constitutional rights. See *Regan v. Taxation With Representation*, 103 S.Ct. 1997, 2001 (1983); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). Moreover, the fact that casinos are regulated likewise fails to diminish their First Amendment rights. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

5. There are a number of sound public policy reasons for authorizing a casino industry. First, casinos attract tourism and can support economic development, as was noted in the Puerto Rico Games of Chance Act, Laws of Puerto Rico, Fourth Regular Session of the Sixteenth Legislature of Puerto Rico (1948, p. 750). The Atlantic City casinos employ roughly 40,000 persons. Second, casinos can be an important source of revenue for government and can support vital government projects, as can be seen, in part, in the proliferation of state-sponsored lotteries. The State of New Jersey received 1984 revenues exceeding \$160,000,000 from the casino revenue tax, which does not include income, sales and property tax revenues generated by the casinos. Fact Sheet, Atlantic City Casino Association, p. 3 (Nov. 1985). Third, effectively regulated casinos

Circuit observed in striking down Mississippi's ban on liquor advertising (*Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, *supra*, 701 F.2d at 324):

[T]here is no 'hazardous product' exception to the First Amendment nor could there well be without destroying the commercial speech doctrine. Many if not most products have hazardous potential: ropes, automobiles and shotguns are familiar examples.

Thus, appellees cannot demonstrate that section 8 promotes "substantial state interests," or that the statute is "finely tailored" to promote those interests which they put forward as justification. After "carefully scrutinizing" appellees' justifications for section 8, the Court must conclude that the statute denies appellant and other licensed casinos equal protection, in violation of the First, Fifth and Fourteenth Amendments.

#### **B. Even Without Heightened Scrutiny, Section 8 Violates Equal Protection.**

Even if appellant's speech rights were not a fundamental interest requiring heightened scrutiny, section 8 still would deny appellant equal protection. As this Court wrote only last Term, when no fundamental interest or suspect classification is presented in an equal protection challenge, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, *supra*, 105 S. Ct. at 3254 citing, *inter alia*, *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-75 (1980). Under this

#### NOTES (Continued)

may divert gambling revenues from illegal or underworld operations, thereby weakening those operations and protecting gambling patrons from the practices of such operations.

standard, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," or upon asserted public objectives that are "not legitimate state interests." *City of Cleburne v. Cleburne Living Center*, *supra*, 105 S. Ct. at 3258; see *Williams v. Vermont*, 105 S. Ct. 2465 (1985) (striking down Vermont tax exemption on equal protection grounds); *Metropolitan Life Insurance Co. v. Ward*, 105 S. Ct. 1676 (1985) (invalidating Alabama tax statute on equal protection grounds).

In *Cleburne*, the city required a special use permit for group homes for the mentally retarded but did not require such a permit for comparable facilities, including apartment houses, dormitories, hotels, hospitals, sanitariums, and most nursing homes. 105 S.Ct. at 3258-59. After reviewing in some detail the city's justifications for treating group homes for the retarded differently from other facilities, the Court concluded that there was no "rational basis for believing that the [group home] would pose any special threat to the city's legitimate interests." *Id.* Indeed, the Court concluded that the special use permit requirement "appears to us to rest on an irrational prejudice against the mentally retarded. . . ." *Id.* at 3260.

The analysis in *Cleburne* is directly applicable to this case. The City of Cleburne could not justify a zoning law that treated group homes for the retarded differently from other multiple dwelling or personal care facilities. Similarly, appellees cannot justify restricting speech concerning one particular form of gambling — casinos — while allowing publicity and advertising about gambling activity related to horse racing, cockfights, the lottery and picas.

The trial court judge attempted to fill this gap in appellees' argument by suggesting that the legislature allowed advertising and publicity about those forms of gambling which "have been traditionally part of the Puerto Rican's roots," while limiting advertising of "more

sophisticated games which are not so widely sponsored by the people." Jurisdictional Statement, p. 35b. But nothing in the record demonstrates that Puerto Ricans historically bet on horse races but not on card or dice games. Accordingly, there is no basis for concluding that the trial court's suggestion either is accurate or was a legislative purpose in prohibiting casino advertising.

Even assuming that the trial court's suggestion is accurate, however, there is no rational relationship between the trial court's suggestion and a ban on casino advertising. Puerto Rico has authorized a licensed casino industry, and allows its citizens to patronize casinos. If Puerto Ricans are truly unfamiliar with casino games compared to other gambling which is "traditionally part of the Puerto Rican's roots," rational public policy would encourage casino advertising and publicity to introduce these new forms of gambling and ensure the success of publicly-licensed casinos.

Without going that far, however, there still is no rational relationship between allowing Puerto Ricans to gamble at licensed casinos while simultaneously denying citizens access to information about those casinos and preventing licensed casinos from communicating with potential patrons. The record demonstrates that the casino advertising ban prevents casinos from communicating with Puerto Ricans and with many of the tourists on the island, who make up the primary market for the casinos. As the trial court observed (Jurisdictional Statement, pp. 23b-24b):

The legislative prohibition of not announcing the casinos in Puerto Rico has prevented the casinos from reaching millions of tourists who arrive in Puerto Rico, since they cannot place announcements in the mass means of communication, in the docks nor in the airports, even though they may be addressed to the tourist and not the local resident. [Mr.

Domenech] and Mr. Andrews testified that the market in Puerto Rico was really secondary but that the limitation affects the promotion to the tourist since there are no economic means which would allow them to announce in the markets which they would have access to if they were allowed to announce in the areas of tourist transit.<sup>6</sup>

Just as the group homes in *Cleburne* posed no "special threat" to local neighborhoods, casino advertising and publicity pose no "special threat" to Puerto Rico's legitimate interests when compared to advertising and publicity about Puerto Rico's other approved forms of gambling. Indeed, the statute at issue appears to be based on "irrational prejudice," not upon a rational relationship between the casino advertising prohibition and a legitimate state interest. Consequently, Section 8 must be invalidated.

## II.

### **This Court Must Resolve The Facial Challenge To Section 8's Constitutionality**

This case comes before this Court on direct appeal under 28 U.S.C. § 1258(2), which provides for such an appeal from a final judgment of the Supreme Court of the Commonwealth of Puerto Rico "where is drawn in

6. Part of the trial court's discussion of equal protection is difficult to follow. The trial court suggested that since the Games of Chance Act "does not establish classifications and equal treatment is given to the holders of [casino] franchises," there is no need to apply heightened scrutiny to the equal protection claim. Jurisdictional Statement, p. 35b. This observation is entirely beside the point. The problem here is the different treatment of casino advertising compared to advertising by other authorized gambling operations. That unequal treatment is the result of the Games of Chance Act, which prohibits casino advertising. That the statute neither discriminates among casino franchises nor specifically mentions other gambling activities is irrelevant to the equal protection challenge presented by appellant.

question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." The threshold question to be addressed is the propriety of this invocation of the Court's appellate jurisdiction. See Order Postponing Jurisdictional Decision For The Merits. As demonstrated below, this Court must rule on appellant's constitutional challenge.

On March 12, 1982, appellant filed a Complaint in the Superior Court of Puerto Rico seeking a declaratory judgment that Section 8 of Puerto Rico's Games of Chance Act together with its corresponding regulations,<sup>7</sup> was unconstitutional because, *inter alia*, its ban on casino advertising violated both the First Amendment's guarantee of freedom of speech and the Fourteenth Amendment's guarantee of equal protection. Appellant challenged the statute on these grounds both on its face and as applied, and the trial court clearly recognized that both types of challenges were being made. See Jurisdictional Statement, pp. 3b-4b. The trial court ruled that "[t]he law on its face is constitutional, but not the interpretation which has been given to it up to now." *Id.* at 37b. To cure the unconstitutional interpretation, that court then formulated elaborate guidelines regulating casino advertising. *Id.* at 38b-41b.

Posadas attempted to appeal that decision to the Supreme Court of the Commonwealth of Puerto Rico ("Puerto Rico Supreme Court"), but that court, with one judge dissenting, refused to hear the appeal. In both its initial papers to the Puerto Rico Supreme Court and its motion for reconsideration of that court's refusal to hear its appeal, Posadas urged the facial constitutional challenges raised below. By refusing to hear the appeal, the Puerto Rico Supreme Court affirmed the trial court's

7. Section 76-218 of the Gaming Regulations parrots the statute. Section 76a-1(7) of those regulations adds: "No concessionaire, nor its agents or employees, shall advertise the gambling parlors to the public in Puerto Rico." Jurisdictional Statement, p. 4.

finding that Section 8 was constitutionally valid on its face.

Posadas, therefore, properly drew into question the facial validity of Section 8 throughout the proceedings. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975). Equally, the proceedings below resulted in a decision "in favor of [section 8's facial] validity," see 28 U.S.C. 1258(2), by a final judgment of the Puerto Rico Supreme Court. Cf. *American Motorists Insurance Co. v. Starnes*, 425 U.S. 637, 641-642 & n. 3 (1976) (appellate jurisdiction properly invoked under 28 U.S.C. §1257(2) after Texas Supreme Court dismissed application for appeal of decision rendered by Texas Court of Civil Appeals).<sup>8</sup> Thus, the requirements of 28 U.S.C. §1258 (2) are plainly satisfied. That leaves only one final prerequisite to proper appellate jurisdiction — this Court's own requirement that the questions supporting an appeal be substantial. See *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391-392 (1952).

The constitutional questions surrounding Section 8's complete ban on advertising by casinos are plainly substantial. Those questions are so substantial that the trial court drastically altered the administrative interpretation of Section 8 in an attempt to salvage the statute. See Jurisdictional Statement, pp. 38b-40b. The question thus becomes whether the judicial alteration has made those constitutional questions insubstantial. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra*, 455 U.S. at 494 n.5 (1982) (court must consider any limiting construction that state court has proffered in evaluating facial challenge to state law).

8. Under 28 U.S.C. §1258, this Court is to "review final judgments or decrees of the Supreme Court of Puerto Rico on certiorari or appeal in the same manner as judgments from the highest courts of the . . . States." S. Rep. No. 735, Pub. L. No. 87-189 (enacting 28 U.S.C. §1258), 75 Stat. 417, 87th Cong., 1st Sess., reprinted in, [1961] U.S. CODE CONG. & ADMIN. NEWS, p. 2448, 2449.

In attempting to limit Section 8's total ban on casino advertising, the trial court developed the following five guidelines:

- 1) any advertising in local media directed to Puerto Rican residents remains absolutely banned;
- 2) advertising outside of Puerto Rico is permitted with the prior approval of the relevant state agency;
- 3) advertising within Puerto Rico that is addressed to tourists and that does not invite Puerto Rican residents is permissible only in places, and through means, primarily available to tourists;
- 4) the word casino can be used in hotel advertising and on hotel goods and supplies if part of the hotel's proper name, and not given undue prominence; and
- 5) advertising is permitted within a hotel with a casino.

Jurisdictional Statement, pp. 38b-40b. These guidelines still sanction a complete ban on a casino's use of certain advertising media, qualify certain permissible advertising only with prior approval and provide unfettered advertising only in restricted places.

Rather than mollify the constitutional concerns raised by Section 8, the trial court's guidelines only exacerbate them. The constitutionality of a complete ban on casino advertising is still at issue with respect to local media in Puerto Rico, while a new issue arises because requiring the prior approval of casino advertising plainly constitutes a prior restraint. See *Nebraska Press Association v. Stuart*, 427 U.S. 539, 558-559 (1976). Moreover, the right to speak cannot be denied in one location (areas not frequented by tourists) simply because it has been granted in another location (areas frequented by tourists). See *Schneider v. State*, 308 U.S. 147, 163

(1939). In sum, the construction of this statute has not eased the substantial question of Section 8's constitutionality.

Of course, the facial invalidation of a statute may be "improvident" when a partial invalidation, or a limiting construction, or a ruling on the statute only as applied, might otherwise suffice. *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794, 2801 (1985). However, none of these options are available here.

First, the challenged statute is too discrete and self-contained to allow any partial invalidation. Unlike the statute at issue in *Brockett*, there is no way to sift out the offending portion of a statute that provides simply: "No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." See *United States v. Ju Toy*, 198 U.S. 253, 262-263 (1905) (Holmes, J.) (statute "being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void"). Second, since the statute at issue is not a federal statute, this Court lacks the power authoritatively to limit it further by construction. See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). Such a limiting construction of this statute can only be approved by a Puerto Rico court. Third, and finally, the statute's sweep is simply too broad to permit a ruling solely on its application to this case. As this Court recently held (*Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S.Ct. 2839, 2853 (1984) (emphasis added)):

Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.

In sum, this Court must decide the facial constitutional validity of Section 8. *See Freedman v. Maryland*, 380 U.S. 51 (1965).

### CONCLUSION

For the foregoing reasons, together with those asserted by the appellant and the other *amici* in support of appellant, this Court should invalidate Section 8 of Puerto Rico's Games of Chance Act for being unconstitutional on its face.

Respectfully submitted,

HERBERT J. MILLER, JR.  
DAVID O. STEWART  
STEPHEN L. BRAGA  
MILLER, CASSIDY, LARROCA &  
LEWIN  
2555 M Street, N.W.  
Washington, D. C. 20037  
(202) 293-6400

December 12, 1985

**AMICUS CURIAE**

**BRIEF**

MOTION FILED

No. 84-1903

DEC 12 1985

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a CONDADO HOLIDAY INN,

Appellant,

—v.—

TOURISM COMPANY OF PUERTO RICO, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

**MOTION OF NATIONAL BROADCASTING COMPANY,  
INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*  
AND BRIEF *AMICUS CURIAE* OF  
NATIONAL BROADCASTING COMPANY, INC.**

*Of Counsel:*

DEAN RINGEL  
LISA PEARSON  
Cahill Gordon & Reindel  
(a partnership including  
professional corporations)

CORYDON B. DUNHAM  
HOWARD MONDERER  
MOLLY PAUKER  
National Broadcasting Company, Inc.

FLOYD ABRAMS  
80 Pine Street  
New York, New York 10005  
(212) 701-3621  
Counsel for *Amicus Curiae*

December 12, 1985

**BEST AVAILABLE COPY**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

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POSADAS DE PUERTO RICO ASSOCIATES,  
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*Appellant,*

—v.—

TOURISM COMPANY OF PUERTO RICO, *et al.*,

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---

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

---

**MOTION OF NATIONAL BROADCASTING COMPANY,  
INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

---

The National Broadcasting Company, Inc. ("NBC"), which operates national television and radio networks and is engaged, *inter alia*, in producing news and entertainment programming and disseminating it to the public through its owned and affiliated broadcast stations in Puerto Rico and throughout the United States, moves the Court for leave to file a brief as *amicus curiae* in support of the appellant in this case. The written consent of the appellant, Posadas de Puerto Rico Associates d/b/a Condado Holiday Inn, has been obtained and has been filed with the clerk of this Court. The consent of the appellees has been requested and refused. This motion is timely since the date for appellant to file its brief is December 12, 1985.

NBC seeks to submit a brief *amicus curiae* because NBC owned stations and affiliates present various kinds of commercial advertising and thus NBC has a specific and direct stake in the outcome of this litigation. More generally, NBC as a communications entity committed to the free flow of information, is concerned by prohibitions such as that imposed by Puerto Rico, which purport to bar altogether the dissemination of truthful, non-deceptive information to the public about activities that are entirely legal.

Accordingly, NBC respectfully requests this Court to grant leave to file its accompanying brief *amicus curiae* to present its views to this Court urging reversal of the decision of the Court below.

Respectfully submitted,

/s/ FLOYD ABRAMS

Floyd Abrams  
80 Pine Street  
New York, New York 10005  
(212) 701-3621

*Counsel for Amicus Curiae*

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IN THE  
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OCTOBER TERM, 1984

No. 84-1903

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POSADAS DE PUERTO RICO ASSOCIATES,  
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*Appellant,*

—v.—

TOURISM COMPANY OF PUERTO RICO, *et al.*,

*Appellees.*

---

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

---

**BRIEF AMICUS CURIAE OF  
NATIONAL BROADCASTING COMPANY, INC.**

---

This brief is respectfully submitted on behalf of National Broadcasting Company, Inc. ("NBC") as *amicus curiae*. NBC supports the position of appellant in this case and urges reversal of so much of the decision below as declined to find the statute and regulations at issue facially unconstitutional.

Section 8 of the Games of Chance Act of The Commonwealth of Puerto Rico, and the rules implementing such statute, even as narrowed and interpreted by the courts of Puerto Rico, are unconstitutional for a variety of reasons. In this brief NBC urges that this Court state unequivocally what its decisions have plainly and uniformly intimated: that government may not wholly prohibit advertising that is neither deceptive nor false and that relates to products lawfully offered for sale within the territory of that government.

### Interest of Amicus Curiae

NBC operates national television and radio networks and is engaged, *inter alia*, in producing news and entertainment programming and disseminating it to the public through its owned and affiliated broadcast stations throughout the country. Among its affiliates NBC numbers WOSO and WHOA radio and WSJU television, all based in Puerto Rico. NBC owned stations and affiliates present various kinds of commercial advertising and thus NBC has a specific and direct stake in the outcome of this litigation. More generally, NBC as a communications entity committed to the free flow of information, is concerned by prohibitions such as that imposed by Puerto Rico, which purport to bar altogether the dissemination of truthful, non-deceptive information to the public about activities that are entirely legal.

This brief is submitted in support of appellant's position that the Puerto Rican statute is facially unconstitutional.

### Summary of Argument

Section 8 of Puerto Rico's Games of Chance Act wholly proscribes any advertising of casino gambling to the public of Puerto Rico. The opinion of the Puerto Rican court, while interpreting the statute as authorizing "exterior" advertising directed to potential tourist-patrons (App. 38b, 32b),<sup>1</sup> makes plain that the statute continues to prohibit any advertisements in the local media "addressed to inviting the residents of Puerto Rico to visit the casinos." *Id.* It finds this legislation constitutional notwithstanding the fact that such gaming casinos are lawful and no allegation has been made that advertising about them is inherently deceptive.

The explanation offered by the trial court as to the intent in enacting the advertising ban is the legislature's interest in

<sup>1</sup> References to "App.\_\_\_\_" are to the appendices annexed to the Jurisdictional Statement.

"protect[ing]" the residents of Puerto Rico against "invitation[s] to play at the casinos" (App. 32b), notwithstanding the fact that participation by Puerto Rican residents is entirely legal. This Court has expressly rejected precisely this "paternalistic" approach. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). It has held that the State may not

"completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773.

This Court has never authorized wholesale *prohibition* of truthful commercial speech about any legal product or service and, as the Court itself has recognized, in recent years it has "not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566, n.9 (1980).

This statement remains an accurate one five years later. Whatever constraints the novelty of applying First Amendment jurisprudence may have once required in the commercial area, see *Friedman v. Rogers*, 440 U.S. 1, 11-12 n.9 (1979), the consistent experience of this Court, in an unwavering application of the law, makes clear the appropriateness and utility of a forthright declaration that a prohibition of truthful, non-deceptive advertising about a lawful product or service is unconstitutional. This brief urges the Court to make plain that this is the Constitution's requirement.

## ARGUMENT

### A Flat Prohibition On Advertising Of Lawful Products Or Services In A Non-Deceptive Manner Is Unconstitutional

Since this Court first held that the First Amendment provided some measure of protection for commercial speech a decade ago, *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court has explored the nature and the extent of the protection afforded such speech.<sup>2</sup> While the scope of that protection has been the subject of somewhat differing articulations during this period, what has remained constant is one result: the court has never countenanced a flat prohibition on non-deceptive advertising with respect to legal products or services of the sort sustained by the Puerto Rican courts. Indeed, several of this Court's holdings provide specific controlling precedent requiring a determination that the statute and regulations at issue here are unconstitutional. Amicus NBC submits that an examination of this Court's own prior decisions and the policies underlying them in the context of the present case warrant the adoption of a rule that total bans on non-deceptive advertising to the public of legal products or services are unconstitutional.

It may be well to begin at the beginning, for this Court's first applications of First Amendment principles to invalidate statutes primarily commercial in nature are factually similar and, if adhered to, themselves dispositive of this case.

In *Bigelow v. Virginia*, *supra*, the editor of a Virginia newspaper was convicted of publishing an advertisement announcing the availability and legality of abortions in New York. At the time, abortion remained illegal in Virginia as did

<sup>2</sup> Amicus NBC focuses in this brief only on the commercial speech aspects of the regulatory scheme as clarified and interpreted by the courts of Puerto Rico. Insofar as the regulation and statute at issue on this appeal were interpreted by administrative authorities to reach actions taken by the casino in connection with press coverage of the controversy over casino regulation, it may well be that the regulatory structure at issue extends beyond commercial speech.

the publication of information encouraging or promoting the procuring of an abortion. Recognizing that the state had an important interest in safeguarding the health of its citizens, this Court nonetheless rejected Virginia's attempt to control what its citizens could and could not hear about commercial activities which were lawful in another state, notwithstanding the fact that the same activity was unlawful in Virginia.

The facts in this case are, if anything, clearer in reflecting the unconstitutionality of the statute in question. Thus, while Virginia's ban aimed at conduct illegal within its borders, Puerto Rico has sought to prohibit advertising of conduct that it has made entirely legal. Indeed, in many senses the present statute is the obverse of the Virginia statutory scheme. The Puerto Rican legislation, as construed below, allows efforts to inform *non-residents* about Puerto Rican casinos. Only Puerto Rico's *own citizens* are to remain in ignorance of the lawful casino activities.

The rationale underlying the Court's actions in *Bigelow* was further explored in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, where this Court struck down a flat prohibition on pharmacists' advertising of retail drug prices. The Court noted the real concern expressed by the State with respect to the impact of price information on consumers and the regulated pharmacists themselves. But it held that such an interest was inadequate to overcome the Constitution in the context of a flat ban. The Court was troubled by the assumptions underlying the State's protection of its citizens for "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." 425 U.S. at 769. This Court recognized that the system of censorship was based on the assumption that consumers would use suppressed information in a fashion contrary to their best interest, and suggested:

"There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this

information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." 425 U.S. at 770.

The Court recognized that this approach and the "paternalistic" approach adopted by Virginia were in conflict, and concluded:

"But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse of it is freely available, that the First Amendment makes for us." *Id.*

It struck down the Virginia statute as facially unconstitutional.

The Court was clear in defining the issue upon which it ruled in *Virginia Board*:

"What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." 425 U.S. at 773.

Although it reserved other questions, the Court answered this specific question directly and in the negative. That negative answer is controlling here.

The impermissibility of a flat prohibition on non-deceptive speech about a lawful subject has been noted frequently by the Court in subsequent decisions even in the face of significant state interests. Thus, in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Court struck down a local ban on residential "for sale" signs, notwithstanding the interest in encouraging racial integration and deterring panic selling. The Court reaffirmed its rejection of the concept that

"the only way [a state] could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading . . . ." 431 U.S. at 97.

The Court emphasized that the constitutionally preferred approach is one of "more speech, not enforced silence." *Id.*, quoting Brandeis, J., concurring in *Whitney v. California*, 274 U.S. 357, 377 (1927).

Again, in *Carey v. Population Services International, Inc.*, 431 U.S. 678 (1977), the Court struck down a flat ban on advertising contraceptives despite asserted state interests in protecting the public against offensiveness and implicit legitimation of youthful sexual activity. The Court recognized that the "statute challenged here seeks to suppress completely any information about the availability and price of contraceptives." 431 U.S. at 700 (footnote omitted). The Court held such restriction invalid. (See also opinion of Powell, J., concurring, recognizing that whether or not the proffered justifications could support regulation they "cannot support a complete ban on advertising." *Id.* at 712.) See also *Bates v. State Bar*, 433 U.S. 350, 383 (1977) ("advertising by attorneys may not be subject to blanket suppression," although regulation is permissible).

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, *supra*, the Court sought to distill the principles articulated in its commercial speech cases into a single test of general applicability with respect to restrictions on commercial speech. The first prong of the now-familiar four-part test inquires as to the lawfulness of the activity being advertised and whether or not the speech is misleading. If the speech satisfies these elements the test requires an examination of the purported state interest to determine if it is "substantial" and whether the legislation "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566. While the Court's language leaves open the possibility that non-deceptive advertising about legal products or services theoretically could

be prohibited, neither *Central Hudson* itself nor this Court's subsequently decided cases supports that result.

That this Court has viewed total prohibitions on the dissemination of truthful commercial speech with the greatest wariness (as it has in other First Amendment contexts)<sup>3</sup> has been a constant theme running throughout this Court's opinions:

"We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See *Virginia Pharmacy Board*, 425 U.S., at 780, n.8 (Stewart, J., concurring). Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, *supra*, 447 U.S. at 566 n.9.<sup>4</sup>

The Court's description of its uniform rejection of flat bans on non-deceptive advertising of lawful products or services remains accurate today. And its concern about the state purpose underlying bans in such circumstances is well illustrated by the present case, as discussed *infra*.

Since it articulated the standard in *Central Hudson*, the Court has decided a number of commercial speech cases in

<sup>3</sup> See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.35 (1976) (Stevens, J., plurality opinion); *id.* at 81 n.4 (Powell, J., concurring). See also *Talley v. California*, 362 U.S. 60 (1960); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Sain v. New York*, 334 U.S. 558 (1948).

<sup>4</sup> See also Blackmun, J., concurring: "Those [statutes] designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated." 447 U.S. 574 (footnote omitted).

which it concluded that it faced a flat ban on non-deceptive speech about a lawful product. In each case it struck down the statute. It did so in *Central Hudson* itself. It did so again in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (federal statute barring mailing of advertisements for contraceptives held unconstitutional).

Significantly, in cases in which the Court concluded that no flat ban was involved, it nevertheless distinguished such cases from less restrictive regulation:

"A state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients." *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981) (plurality).<sup>5</sup>

And in one of a series of lawyer advertising cases, the Court made plain in that context the distinction between regulation and prohibition.

"Truthful advertising\* related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982).

The Court followed through on the distinction between regulations and prohibition later in that opinion.

<sup>5</sup> The plurality concluded that no flat ban was involved in that case. 453 U.S. at 515 n.20.

"Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-564." 455 at 203 (emphasis added).

Significantly, it was only in the context of discussing restrictions (not in the earlier context of prohibitions) that *Central Hudson's* full four part test is mentioned by this Court in the passages from the *R.M.J.* opinion quoted above.

In *Bolger, supra*, the Court did apply the four part test, as it did in *Central Hudson, supra*. In each, however, notwithstanding the state's genuine and serious interests, the rulings striking down bans on truthful and non-deceptive commercial speech were preordained by the four-part test itself. For as this Court's decisions have now made plain, an absolute prohibition on non-deceptive speech about lawful activity simply cannot satisfy the last two parts of the *Central Hudson* test.<sup>6</sup>

First, it is impossible to imagine a case in which some less restrictive means of satisfying a legitimate legislative end is not available as an alternative to a total ban. As a decade of litigation in this Court has demonstrated, whether through a requirement that there be "more speech" (see *Linmark Associates, Inc. v. Township of Willingboro, supra*, 431 U.S. at 97), or through specific and focused regulation, legitimate state interests can always be fully served without use of instruments as blunt and all-encompassing as flat prohibitions.

Further, as the Court recognized in *Central Hudson*, flat bans often serve to "screen from public view the underlying governmental policy." 447 U.S. at 566 n.9. Here it is plain that the prohibition at issue serves to screen a policy that is itself of

<sup>6</sup> For a discussion of this point see Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 83 Colum. L. Rev. 632 (1985) ("Advertising Bans").

dubious constitutionality: discouraging Puerto Rican residents from gaming at local casinos, while encouraging non-resident tourists to do so. The trial court found the purpose of such legislation was to "protect" Puerto Rican residents (App. 32b). In its motion to dismiss in this Court, the Commonwealth rather more ambiguously asserts only that it was not the intention of the legislature in legalizing gaming casinos to lure Puerto Rican residents to the casinos. In any event, it is clear that at best the legislation is premised on the very paternalism rejected by this Court's decisions.<sup>7</sup> At worst it seeks to conceal<sup>8</sup> a discriminatory motive that would raise serious constitutional problems if directly acted upon by way of prohibition on the conduct of Puerto Rican residents.<sup>9</sup> To permit the use of

<sup>7</sup> Plainly the legislation impinges as well on the interests of personal autonomy, the right of a citizen to make his or her own decision as to use of a lawful service based on all available information. See, *Advertising Bans, supra*, 85 Colum. L. Rev. at 649 *et seq.*

<sup>8</sup> This is "a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." *Central Hudson Gas & Electric Corp. v. Public Service Commission, supra*, 447 U.S. at 574-75 (Blackmun, J., concurring).

<sup>9</sup> Certainly, a statute explicitly barring casino gambling by native Puerto Ricans but permitting tourists to engage in that activity would raise grave constitutional questions. Such a statute might well be viewed as an invidious statutory classification based upon a suspect category (e.g., race or alienage) and could not withstand the strict scrutiny under the equal protection guarantees of the U.S. Constitution that such categorization would entail. See *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Rivas Tenorio v. Liga Atletica Interuniversitaria*, 554 F.2d 492 (1st Cir. 1977) (Puerto Rican athletic association rule providing that student athletes not born in Puerto Rico who enter member institution after their twenty-first birthday may not participate in annual competitions requires strict scrutiny as a classification drawn on the basis of alienage). Indeed, even if none of these criteria were involved and traditional equal protection analysis were employed, the Puerto Rican legislature would be hard-pressed to justify such a law as rationally related to a legitimate governmental interest. See *Zobel v. Williams*, 457 U.S. 55 (1982); see also *Rhode Island Chapter of the National Women's Political Caucus, Inc. v. Rhode Island Lottery Commission*, 609 F. Supp. 1403 (D.R.I. 1985) (exception to statute prohibiting the opera-

prohibitions with respect to non-deceptive advertising of lawful products is to allow the legislature to conceal its true purpose from the Courts—and from the electorate.

This case may serve as the paradigmatic example of the abuse that wholesale prohibitions on truthful speech always permit. Such bans allow legislatures to avoid confronting precisely what conduct must be regulated; they permit the legislature to do by indirection and without public acknowledgment what it may be unwilling—or legally unable—to do directly. By barring speech and not conduct, such prohibitions by their nature involve an inversion of First Amendment principles.

This Court's decisions over the years have made plain that prohibitions on non-deceptive speech about lawful products or services cannot survive the tests articulated by the Court. As Justice White noted in another First Amendment context, when "the recurring result . . . in case after case" has made plain the need for "a more general rule [to] avoid the interminable litigation that our failure to do so would necessarily entail," adoption of a general rule commends itself. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 571 (1976) (White, J., concurring). Whatever doubts may have been occasioned by the "relative novelty of First Amendment protection" for commercial speech in the past (*Friedman v. Rogers*, *supra*, 440 U.S. at 11 n.9), the accrual of precedent, "the recurring result

tion of lotteries and games of chance, under which political parties whose candidate for governor at the preceding gubernatorial election garnered at least five percent of the vote could conduct fund-raising raffles, invidiously denies equal protection to minority political parties even when analyzed under rational basis standard of review). By the same token, if the legislature enacted a statute declaring casino gambling unlawful, but only enforced that statute against native Puerto Ricans, the denial of equal protection would be manifest. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *People v. Harris*, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (App. Dep't Super. Ct. 1960) (purposeful discriminatory enforcement against blacks of penal law prohibiting gambling constitutes a denial of due process and equal protection).

. . . in case after case" (*Nebraska Press Ass'n*, *supra*) in this Court, has made plain the need and workability of a rule that flat bans on non-deceptive advertising of lawful services are unconstitutional. We urge the Court to so hold.<sup>10</sup>

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment appealed from should be reversed and the legislation and regulations at issue be held facially unconstitutional.

Respectfully submitted,

FLOYD ABRAMS  
80 Pine Street  
New York, New York 10005  
(212) 701-3621

Counsel for *Amicus Curiae*

### Of Counsel:

DEAN RINGEL  
LISA PEARSON  
Cahill Gordon & Reindel  
(a partnership including  
professional corporations)

CORYDON B. DUNHAM  
HOWARD MONDERER  
MOLLY PAUKER  
National Broadcasting Company, Inc.

<sup>10</sup> This Court's summary affirmance of a ban on television advertising of cigarettes, *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem.*, 405 U.S. 1000 (1972), was decided before this Court extended constitutional protection to purely commercial speech. It is in no way a barrier to adoption of the approach suggested in the text. See *Advertising Bans*, *supra*, 85 Colum. L. Rev. at 632-33.

**AMICUS CURIAE**

**BRIEF**

MOTION FILED  
DEC 12 1985

No. 84-1903

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a CONDADO HOLIDAY INN,  
v. *Appellant,*  
TOURISM COMPANY OF PUERTO RICO,  
*Appellee.*

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On Appeal from the Supreme Court of Puerto Rico

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF OF AMICUS CURIAE  
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION  
IN SUPPORT OF APPELLANT**

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*Of Counsel:*

W. TERRY MAGUIRE  
RENÉ P. MILAM  
*American Newspaper  
Publishers Association*

P. CAMERON DEVORE \*  
MARSHALL J. NELSON  
SUSAN J. WOYNA  
DAVIS, WRIGHT, TODD, RIESE &  
JONES  
4200 Seattle-First National  
Bank Building  
Seattle, WA 98154  
(206) 622-3150  
*Counsel for Amicus Curiae*

December 12, 1985

\* Counsel of Record

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 84-1903

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POSADAS DE PUERTO RICO ASSOCIATES,  
d/b/a CONDADO HOLIDAY INN,  
v. *Appellant,*  
TOURISM COMPANY OF PUERTO RICO,  
*Appellee.*

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On Appeal from the Supreme Court of Puerto Rico

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

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The American Newspaper Publishers Association ("ANPA") respectfully moves for leave to file the attached brief *amicus curiae* in support of the appellant in this case. The written consent of appellant's counsel has been obtained and filed with the Clerk of the Court pursuant to Rule 36 of the Court. Consent of the appellee and the Secretary of Justice of Puerto Rico has been requested, but has not been received as of this writing.

The interest of ANPA in this case is set out in detail in the attached brief. Stated succinctly, ANPA is a national trade association representing approximately 90% of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States, including Puerto Rico. These newspapers have the basic function of gathering

and publishing news, information, and advertising. The protection of commercial speech under clearly articulated, consistent, and predictable First Amendment standards is therefore of vital interest to the Association. ANPA addressed the Court as *amicus curiae* on these issues in *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984).

The attached brief focuses squarely on the First Amendment commercial speech issue and proper analysis of the case under this Court's decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) and related cases. As a non-party, with no other interest in the proceedings, ANPA is able to provide a broader perspective on this fundamental issue. At the same time ANPA brings to the case the perspective of a substantial segment of the nation's media, who are directly affected by the Court's decisions in the areas of commercial speech and First Amendment protections, in general.

ANPA therefore respectfully moves the Court for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

P. CAMERON DEVORE \*  
DAVIS, WRIGHT, TODD, RIESE &  
JONES  
4200 Seattle-First National  
Bank Building  
Seattle, WA 98154  
(206) 622-3150  
\* Counsel of Record  
for Amicus Curiae

December 12, 1985

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 BRIEF OF AMICUS CURIAE  
 AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION  
 IN SUPPORT OF APPELLANT

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 STATEMENT OF INTEREST

The American Newspaper Publishers Association ("ANPA") supports the position of the appellant in the above-captioned case on the issue of whether the advertising regulations of the Commonwealth of Puerto Rico violate the First Amendment. ANPA takes no position on the remaining issues in the case, and its participation as *amicus curiae* should in no way be considered as an endorsement of casinos or gambling.

ANPA is a national trade association representing approximately 1,385 newspapers throughout the United States, including Puerto Rico. Its membership constitutes approximately 90% of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

Neither the Association nor the majority of its members are directly affected by the advertising restrictions imposed by the Commonwealth of Puerto Rico under its gambling statutes. However, they do have a substantial interest in the First Amendment issues raised in the proceedings below.

Newspapers have the basic function of gathering and publishing news and information. The process involves questions of First Amendment freedoms at every level, from the newsroom to the advertising department. The protection of commercial speech under clearly articulated, consistent, and predictable First Amendment standards is therefore of vital interest to the Association. It is this interest, and solely this interest, that is addressed in the following brief.

### SUMMARY OF ARGUMENT

This case involves an attempt by Puerto Rico to prevent casino advertising from reaching the "public of Puerto Rico". Although there is evidence in the record that the ban reaches further to prevent other kinds of protected speech, the case is ultimately about advertising and commercial speech. As such, it is governed by this Court's decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and its progeny.

Under *Central Hudson*, the Court has indicated that it will "review with special care regulations that entirely suppress commercial speech in order to pursue a non-

speech-related policy," 447 U.S. at 566 n.9, and will apply a four-part inquiry in this review:

1. Whether the commercial speech in question concerns a lawful activity and is not misleading;
2. Whether the governmental interest asserted in support of regulation is substantial;
3. Whether the regulation directly advances the governmental interest asserted;
4. Whether the restriction goes no further than necessary to serve that interest.


447 U.S. at 566.

The burden is squarely on the state to satisfy the elements of this test. *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2277 (1985); *In re R.M.J.*, 455 U.S. 191, 205-206 (1982). See also *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). The record below indicates that the government of Puerto Rico cannot meet this burden.

Casino gambling is a lawful activity in Puerto Rico and there is no suggestion that the advertising in question is misleading. In fact, the prohibition applies to all advertising without regard to truth or deception.

Although the interest in regulating gambling is clearly a substantial state interest, the interests served by prohibiting its advertising are not. The interests asserted by the Commonwealth are at best confused, and at worst, self-contradictory. The ultimate goal—to keep information about casinos away from the population of Puerto Rico—is, itself, impermissible under the First Amendment. See *Central Hudson*, 447 U.S. at 566 n.9.

Even if the interests asserted by the government were found to be substantial, the prohibition of casino advertising does not directly advance, and may actually frustrate, the asserted state goals. Prohibition of advertising



does not discourage possible criminal activity attracted to gambling casinos by their very existence. Prohibition of advertising does not erase the commonly-known fact that casino gambling is one of many forms of gambling legally operated in Puerto Rico and does not prevent local residents from patronizing the casinos. Instead, the prohibition does limit the effectiveness of Puerto Rico's other stated goal, to promote casinos to the tourist trade.

Even if the state's burden could be met on these second and third elements of the test, a total ban on casino advertising in Puerto Rico clearly goes further than necessary to serve any legitimate state interests and, as the record indicates, impacts non-commercial speech as well. There are many avenues short of an advertising ban available to Puerto Rico to fulfill its goals: more direct regulation of local participation in casino activity, greater security measures, and more information and education concerning the evils of gambling—none of which requires prohibition of speech.

However legitimate Puerto Rico's goals and motives may be in attempting to regulate a form of gambling, they cannot be allowed to frustrate the national policy favoring the free flow of commercial information under the First Amendment and its consistent application in the decisions of this Court.

## ARGUMENT

### I. THE PROHIBITION OF TRUTHFUL COMMERCIAL SPEECH CONCERNING LAWFUL ACTIVITY RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION UNDER THE FIRST AMENDMENT AND THE DECISIONS OF THIS COURT.

In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court recognized that commercial advertising is entitled to First Amendment protection, even in the face of substantial state regulatory goals. In cases that followed, the Court reaffirmed this protection against state efforts to regulate the advertising of prescription drugs, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); racially motivated real estate sales, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); and lawyer advertising, *Bates v. State Bar*, 433 U.S. 350 (1977). In each case, the Court was required to reconcile the constitutional policy in favor of free exchange of commercial information with asserted state interests in protecting the public from the effects of such communication.

In *Central Hudson* the Court articulated a specific analytical framework for weighing legitimate state interests in regulating commercial speech against the imperatives of the First Amendment. The *Central Hudson* test has served the Court well in every case since the decision and has been applied consistently in opinions joined, respectively, by every member of the Court. See *In re R.M.J.*; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Zauderer*. It provides the means for determining whether restrictions on speech will "directly advance a substantial governmental interest" and for insuring that "restrictions involving commercial speech that is not itself deceptive [are] narrowly crafted to serve the State's purposes." *Zauderer*, 105 S. Ct. at 2278.

In the present case, the *Central Hudson* test was not even applied by the court below. Although the trial judge

tried diligently to rewrite Puerto Rico's regulation to preserve its constitutionality, he did so without analyzing whether the asserted interests of the state were truly substantial and whether the regulation would, in fact, directly advance those interests—two burdens that must be met by the government under *Central Hudson* before the scope of the regulation can even be considered. *Central Hudson*, 447 U.S. at 568-69; *Zauderer*, 105 S. Ct. at 2278-79.

The decision below, construing the advertising ban as protecting the public of Puerto Rico as well as its tourists, conflicts with the notion that "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." *Central Hudson*, 447 U.S. at 562 (quoting *Virginia State Board of Pharmacy*, 425 U.S. at 770). It is the informational function of advertising that undergirds the First Amendment's concern for commercial speech. *Central Hudson*, 447 U.S. at 563.

It is the role of this Court to test the record against this constitutional standard and to determine whether Puerto Rico's prohibition of local casino advertising impermissibly infringes the First Amendment. *Bose v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984).

## II. PUERTO RICO'S PROHIBITION OF LOCAL CASINO ADVERTISING CANNOT MEET THE STANDARDS ESTABLISHED BY THIS COURT IN *CENTRAL HUDSON* AND SUBSEQUENT CASES.

### A. The Advertising in Question is Truthful and Concerns Lawful Activity.

The first step of the *Central Hudson* analysis requires determination that the advertising concerns lawful activity and is not misleading. 447 U.S. at 566.

The casinos that are forbidden to advertise in Puerto Rico are, by act of the legislature, entirely lawful businesses in that jurisdiction. (Appendix to Juris. Statement at 30b, 32b). There is nothing in the record to suggest that Puerto Rico forbids its residents to play at the casinos. Indeed, approximately five percent of the persons who do play at these casinos are residents of Puerto Rico. (Appendix to Juris. Statement at 22b). Therefore, the advertising of those businesses to the public of Puerto Rico would propose a perfectly legal transaction.

By suppressing information to its residents about this lawful activity, Puerto Rico attempts to manipulate a private economic decision that it has chosen not to outlaw directly. See *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring in judgment). Depriving citizens of the information needed to make a free choice is not a permissible way to "dampen" the use of casinos by residents. See *id.* at 574 (Blackmun, J., concurring in judgment); see also *Linmark Associates*, 431 U.S. at 96-97 (ordinance whose purpose was to influence behavior by depriving citizens of information held constitutionally defective).

In addition, the challenged law forbids truthful, as well as untruthful or misleading, advertising. Commercial messages that accurately inform citizens of even the mere existence of casinos have been banned. (Appendix to Juris. Statement at 17b, 21b). While Puerto Rico may prevent the dissemination of advertising that is deceptive or misleading or proposes an illegal transaction, a blanket ban on the dissemination of truthful commercial speech relating to lawful activity must overcome substantial First Amendment barriers. See *Zauderer*, 105 S. Ct. at 2278-81; *In re R.M.J.*, 445 U.S. at 203; *Central Hudson*, 447 U.S. at 564. Unless Puerto Rico can demonstrate that its advertising restrictions meet the other three elements of the *Central Hudson* test, the prohibition cannot survive scrutiny under the First Amendment. *Id.*

Although casino advertising may, like lawyer advertising, risk appealing to human weakness or gullibility, this fact alone cannot justify its prohibition. The Court has consistently rejected bans of advertising alleged to be potentially misleading. *See Bates*, 433 U.S. at 372-75; *In re R.M.J.*, 455 U.S. at 206-207; *Zauderer*, 105 S. Ct. at 2278-81. The Court has also rejected paternalistic attempts by states to shield the public, or a particularly vulnerable segment of the population, from allegedly harmful information. *See Bolger*, 463 U.S. at 73-74; *Bigelow*, 421 U.S. at 827. The mere potential for abuse is not sufficient to support a ban of truthful advertising concerning lawful activities.

**B. The Substantial State Interest in Regulating Casino Gambling is Not at Issue. The Interests Served by the Advertising Ban Are Not Substantial.**

The second step of the *Central Hudson* test is determination of whether the asserted governmental interest is substantial. 447 U.S. at 566. Here, the facts lead to the clear conclusion that the interests asserted by Puerto Rico are not substantial. However, the analysis is complicated by several factors.

First, it is conceded that gambling, in general, is an activity fully subject to the police power of the various states and may be regulated or banned outright. ANPA does not question Puerto Rico's right to regulate this type of activity. However, even the most laudable goals cannot legitimize a ban on commercial speech that fails to meet the strict requirements of the First Amendment. *Linmark Associates*, 431 U.S. at 94-97. The issue here is not whether Puerto Rico may ban or restrict casino gambling. It is whether, having legalized such gambling, the Commonwealth can prohibit dissemination of information about such activity. The burden is on the government to establish not merely a substantial interest in the abstract, but a substantial state interest that is served by the advertising ban. *Zauderer*, 105 S. Ct. at 2277.

Here, Puerto Rico's interest is at best confused and at worst, self-contradictory. Two interests are asserted in the record below: (1) to protect tourists from possible criminal activity attracted to gambling casinos by local promotion; (2) to discourage casino gambling by local residents, while at the same time promoting casino gambling as a tourist attraction. Implicit in these goals may be others, including protection of the casinos and the Commonwealth itself from criminal activity sometimes associated with casino gambling, and protection of the residents from the evils of a nonindigenous form of gambling.

For purposes of discussion, these interests may be characterized generally as an interest in security and an interest in discouraging residents from gambling. Although each interest might be "substantial" in the abstract, neither withstands scrutiny in this case.

The government's security-related arguments appear to be based on two assumptions: that security of the casinos and their patrons will be threatened if tourists are allowed to mingle with residents; and that persons drawn to casinos for criminal purposes will be drawn there by advertising. While the physical security of tourists may be a substantial interest, it is difficult to see how their isolation from local residents can be a legitimate state interest. The government takes no steps to "protect" tourists from mingling with its residents in any of the many other lawful gambling activities in Puerto Rico. There is likewise no evidence in the record, and no logical reason to assume, that persons drawn to casinos for criminal purposes are drawn there by advertising and not by the simple fact that the casinos exist and are successfully promoted as part of the Commonwealth's own efforts to promote tourism.

The interest in discouraging gambling by residents might be substantial were it not for the fact that Puerto Rico clearly permits, encourages, and advertises a wide variety of gambling activities, many of which are out-

lawed in other states. The government itself conducts and advertises lotteries. It permits not only casino gambling, but bingo games, gambling on horse races and cock fights. The facts that all of these gambling activities except casinos may freely advertise to the public of Puerto Rico, and that tourists are *encouraged* to engage in casino gambling, undermine the government's argument. As the Court noted in a different context in *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2709 (1984):

Although a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption in order to constitute a valid exercise of state power under the Twenty-first Amendment, the selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here.

The same logic applies to Puerto Rico's extraordinarily selective effort to ban only one kind of gambling advertising while permitting all others.

Where a state elects to legalize gambling in many forms and actively promotes gambling as a tourist attraction, it is hard pressed to argue that there is a substantial state interest in discouraging gambling by its residents. On a narrower focus, it is difficult to see how Puerto Rico can have a substantial interest in protecting its residents from the perceived evil of casino gambling, while at the same time encouraging visitors to indulge in it.

Finally, it is impossible to ignore the underlying theme of Puerto Rico's asserted interests—i.e., that the regulations are intended to prevent information about casino gambling from reaching the public of Puerto Rico. That interest, far from being "substantial," is, on its face, impermissible under the First Amendment and begs the very question before the Court. See *Central Hudson*, 447 U.S. at 562; *Virginia State Board of Pharmacy*, 425 U.S. at 770.

### C. The Advertising Ban Does Not Directly Advance the State Interests Asserted.

The third step of the analysis prescribed by *Central Hudson* is to determine whether the restriction on speech directly advances a substantial state interest. 447 U.S. at 566. If the State has not met its burden of establishing a substantial interest to be served, the Court need not reach this step. See *Zauderer*, 105 S. Ct. at 2278-2280; *In re R.M.J.*, 455 U.S. at 205-206. However, even if the interests that have been or might be asserted by Puerto Rico could rise to the level of a *substantial* interest, it is clear that any link between these interests and the ban on local advertising is tenuous at best.

#### 1. Interest in Security.

Puerto Rico asserts an interest in protecting the patrons of its casinos (and, presumably, the casinos themselves) from members of the local public who may be attracted to the casinos for criminal or undesirable purposes. However, the existence of the casinos is public knowledge, and there is nothing in the record to suggest that further advertising their existence will attract more of this criminal element than may already be drawn by the mere legal operation of the casinos. See *Bates*, 433 U.S. at 378 (those inclined to do shoddy work will do so regardless of the regulation of advertising); *Virginia State Board of Pharmacy*, 425 U.S. at 769 (banning advertising will not prevent pharmacists inclined to cut corners from doing so). There is also no indication that the criminal element is any more likely to come from the local populace than from the outside.

#### 2. Interest in Discouraging Gambling.

Puerto Rico also asserts an interest in promoting casinos as a tourist attraction, while at the same time discouraging their patronage by local residents. Whatever the merits of this paternalistic approach, a total ban on local advertising advances neither goal.

Whatever restrictions are imposed on local advertising will necessarily limit the desired promotion to tourists. The record below indicates that numerous tourists are likely to enter Puerto Rico without being exposed to the tourist magazines or in-hotel advertising that the trial court's rewritten regulation clearly permits. (Appendix to Juris. Statement at 23b.)

On the other hand, if the asserted State interest is to discourage patronage of casinos by local residents, there are many more direct means available to the Commonwealth, including direct restrictions on the methods of operation and nature of permitted casino activities and taxation of gambling winnings. As noted above, the existence of casinos and the nature of their activities are common knowledge in Puerto Rico. There is no evidence in the record to suggest that withholding information about them will somehow erase this fact from the public mind.

If the dangers and evils of casino gambling are to be addressed by the government, this Court has made it clear that "the preferred remedy is more disclosure, rather than less" in such cases. *Bates*, 433 U.S. at 375. Public debate and even state-sponsored public education on these issues is not only more direct, but also far preferable under the First Amendment. As this Court noted in *Central Hudson*, the Court will

review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying government policy.

447 U.S. at 556 n.9.

The burden is squarely on the state to establish not only the substantiality of its interest in regulating speech, but also the efficacy of that regulation in directly advancing the substantial state interest. *Central Hudson*,

447 U.S. at 569; *Zauderer*, 105 S. Ct. at 2280. If there is, in fact, a nexus between the prohibition of advertising and advancement of the state goals, it is up to the government to demonstrate it. In the absence of such a showing, the logical conclusion from this record is that the connection does not exist.

**D. A Total Ban on Casino Advertising in Puerto Rico is Broader Than Necessary to Further the Asserted State Interests.**

The fourth part of the *Central Hudson* analysis has been characterized by the Court as requiring "that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the [government's] purposes." *Zauderer*, 105 S. Ct. at 2278. Again, if the Commonwealth has not met its burden "of establishing that prohibiting the [advertising in question] directly advances a substantial governmental interest," the court need not reach this final step. The question of whether a restriction goes no further than is necessary presupposes that it is necessary to directly advance a substantial governmental interest. See *Zauderer*, 105 S. Ct. at 2277.

As in *Central Hudson*, the restriction here at issue amounts to the "complete suppression of speech ordinarily protected by the First Amendment." 447 U.S. at 569. The record contains several examples of attempts to restrict speech beyond that which merely proposes a commercial transaction. (See, e.g., Appendix to Juris. Statement at 15b (newspaper advertisement placed by casino employees, congratulating management on opening new wing of the hotel); *id.* at 18b-19b (press conference held by the casino criticizing governmental policy on slot machines).) Prior to the trial court's decision, the law was applied to prevent all public discourse relating to casinos, including cooperation by casinos in news-

paper reporting on the government's regulatory policies. (Appendix to Juris. Statement at 18b-19b, 21b.) Even under the trial court's rewritten regulation, the obvious intent is still to prevent dissemination of information to local residents. In Puerto Rico, such speech is still entirely banned.

The Commonwealth may argue that it has restricted only the *place* such information may be disseminated, and therefore seeks only a valid time, place and manner restriction. The decisions of this Court demonstrate otherwise. To be sustained on this ground, a restriction may foreclose only some means of dissemination, while leaving adequate alternatives. *Linmark Associates*, 431 U.S. at 93; *Virginia State Board of Pharmacy*, 425 U.S. at 771. In the present case, the regulation is admittedly *designed* to foreclose any adequate alternative means of reaching the public of Puerto Rico with casino information; the only permissible audience is non-resident tourists.

More importantly, to be sustained as a mere time, place and manner restriction, a law must be content-neutral. *Linmark Associates*, 431 U.S. at 94; *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 447 U.S. 530 (1980); *Virginia State Board of Pharmacy*, 445 U.S. at 771. Here, the restriction is based specifically on the content and subject matter of the restricted advertising.

This Court has also recognized that restrictions on advertising sweep too broadly when speech to the entire community is forbidden in order to protect the susceptible few. In *Bolger*, the Court applied the *Central Hudson* test to strike down a section of the Postal Laws prohibiting the mailing of unsolicited advertisements for contraceptives. One of the governmental interests asserted in support of the regulation was the interest in helping parents to control their children's education with respect to contraception. The Court held that for this purpose, the regulation was "more extensive than the Constitution

permits, for the government may not 'reduce the adult population . . . to reading only what is fit for children.'" 463 U.S. at 73 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

Puerto Rico's asserted interest in minimizing the flow of information about casinos appears to assume that such information is inherently too dangerous or deceptive to be safely encountered by its citizens. As in *Bolger* and *Virginia State Board of Pharmacy*, this assumption has led to a broad-based ban on a wide variety of constitutionally protected speech, including both non-commercial and commercial messages, and cannot survive constitutional scrutiny.

Less restrictive alternatives are available to serve the asserted governmental interests. The interest in protecting casino patrons can be served with no restriction on speech by implementing and publicizing ordinary security measures. The interest in discouraging local residents from casino gambling may be served by a variety of means, including public education and warnings of the dangers of such gambling, perhaps even funded from taxation of gambling proceeds or winnings. See *Bates*, 443 U.S. at 375, 384; *Central Hudson*, 447 U.S. at 571.

In the present case, the Commonwealth of Puerto Rico has made no attempt to show that such alternative measures would not adequately serve its interests or to demonstrate that its regulations go no further than necessary to directly advance a substantial governmental interest. See *Zauderer*, 105 S. Ct. at 2277, 2280; *In re R.M.J.*, 455 U.S. at 206-207. On the record below, it is clear that they do.

## CONCLUSION

The American Newspaper Publishers Association does not support the legalization or deregulation of casino gambling. However, the Commonwealth's regulations under review do not address that issue. If allowed to stand, the decisions below uphold a restriction on speech that plainly violates the First Amendment, and they do so without any analysis of that restriction under the test set forth by this Court in *Central Hudson* and applied in its subsequent decisions.

Over the past decade this Court has addressed the difficult task of reconciling many substantial state interests in regulation with the substantial Constitutional interest in ensuring the free flow of information, both commercial and non-commercial. In *Central Hudson*, the Court articulated a careful and comprehensive approach to analyzing these conflicts. The Court has also made it clear that

a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

*Bigelow*, 421 U.S. at 826.

ANPA respectfully submits that the primary error of the lower courts in this case is the failure to heed this admonition and the willingness to accept a total ban on protected speech without considering the substantiality of the State interest involved, the efficacy of the proposed regulation, or the excessive scope of its impact. However strong and legitimate Puerto Rico's interest in regulating casino gambling may be, the Commonwealth has not chosen this option. Instead, it has elected to regulate speech. This is "too blunt an instrument" for accomplishing its goals, *Lowe v. S.E.C.*, 105 S. Ct. 2557, 2586 (1985) (White, J., concurring), and infringes First

Amendment rights. The decision below should therefore be reversed.

DATED this 12th day of December, 1985.

*Of Counsel:*

W. TERRY MAGUIRE

RENÉ P. MILAM

*American Newspaper  
Publishers Association*

P. CAMERON DEVORE \*

MARSHALL J. NELSON

SUSAN J. WOYNA

DAVIS, WRIGHT, TODD, RIESE &  
JONES

4200 Seattle-First National

Bank Building

Seattle, WA 98154

(206) 622-3150

*Counsel for Amicus Curiae*

\* Counsel of Record

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MOTION FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE AND BRIEF OF THE  
AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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ROBERT M. WEINBERG  
PETER O. SHINEVAR  
1000 Connecticut Avenue  
Washington, D.C. 20036

LAURENCE GOLD  
815 Sixteenth Street, N.W.  
Washington, D.C. 20006  
(202) 637-5390  
(Counsel of Record)

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 84-1903

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POSADAS DE PUERTO RICO ASSOCIATES, D/B/A  
CONDADO HOLIDAY INN,  
*Appellant,*

v.

TOURISM COMPANY OF PUERTO RICO, *et al.*,  
*Appellees.*

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On the Appeal from the  
Supreme Court of Puerto Rico

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**MOTION BY THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE  
IN SUPPORT OF APPELLANT**

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the attached brief *amicus curiae* in support of the position of the appellant. Counsel for appellant has consented to the filing of this brief but counsel for appellees has declined to do so.

The AFL-CIO is a federation of 95 national and international unions having a total membership of over

13,000,000 working men and women. This case raises a question that goes to the heart of the power of government to regulate commercial speech: whether, consistent with the First Amendment, the government may ban truthful, non-deceptive commercial speech because the government is concerned that the speech may persuade individuals to engage in lawful conduct that the government wishes to discourage. Like other frequent speakers in the public arena, the AFL-CIO and its affiliates have a strong general interest in the resolution of this question. And, because this Court has not yet conclusively defined the precise contours of "commercial speech," the AFL-CIO and its affiliates, as frequent speakers on matters commercial or economic in nature, have a particular concern that the resolution of this case may have a bearing on their ability to express their views on such matters.

For the foregoing reasons, this motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

ROBERT M. WEINBERG

PETER O. SHINEVAR

1000 Connecticut Avenue

Washington, D.C. 20036

(202) 833-9340

LAURENCE GOLD

AFL-CIO

815 Sixteenth Street, N.W.

Washington, D.C. 20006

(202) 637-5390

(Counsel of Record)

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**BRIEF OF THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF APPELLANT**

---

This brief of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) as *amicus curiae* is filed contingent on the granting of the attached motion for leave to file said brief. The AFL-CIO's interest in this case is described in that motion.

## SUMMARY OF ARGUMENT

This brief addresses a single question: whether, consistent with the First Amendment, the government may—as Puerto Rico has done—ban truthful, nondeceptive commercial speech directed to the general public because the government is concerned that the speech may persuade individuals to engage in lawful conduct that the government wishes to discourage. It is our submission that such a ban violates the First Amendment.

1. This Court has never upheld a ban on commercial speech that is designed to keep members of the public ignorant of truthful, nondeceptive information related to a lawful transaction. This Court's decisions, however, do not unequivocally negate the proposition that there are circumstances in which such a ban on commercial speech might be upheld.

In *Va. Pharmacy Bd. v. Va. Consumers Council*, 425 U.S. 748 (1976), the Court struck down a state statute prohibiting licensed pharmacists from advertising the prices of prescription drugs that the pharmacists dispense, holding that the government may not promote the professional standards of pharmacists "by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." Subsequently, in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), the Court again ruled that a ban on commercial speech could not be justified by a claim that keeping truthful, nondeceptive information from the public would advance an important governmental interest. But in *Central Hudson Gas & Elec. v. Public Serv. Comm.*, 447 U.S. 557 (1980), the Court—although again striking down a ban on commercial speech purportedly justified by an important governmental interest that would be served by keeping truthful, nondeceptive information from the public—suggested that there may be some room for the government to ban commercial speech on that basis.

2. If the speech in question were not commercial speech but speech entitled to the full measure of First Amendment protection, a governmental objective of keeping the public ignorant of lawful options could not justify banning the speech. This Court's decisions establish two basic and interrelated principles respecting the essential nature of the First Amendment's protection of speech. First, the government may not prohibit speech because those in power disagree with the message. Second, the free flow of information from all interested parties, not censorship, is the means consistent with the Constitution to deal with questions in controversy. Thus, in general, the First Amendment does not permit government to ban speech because that speech advocates ideas or actions that are deemed by the government to be inimical to some public interest.

If the result is to be different when commercial speech is involved, that can be only because some characteristic of commercial speech justifies the difference. But the reasons this Court has stated for including commercial speech within the protection of the First Amendment would be defeated if the government could ban commercial speech absolutely because the government fears that members of the public will be persuaded by the speech's message to engage in activity that the government has not regulated but nonetheless wishes to discourage. And, the reasons this Court has given for permitting commercial speech to be subjected to a greater degree of regulation than other speech do not justify regulation designed to silence completely a truthful, nondeceptive message. The government may not, therefore, prohibit legitimate businessmen from truthfully and nondeceptively informing the public of their wares.

### ARGUMENT

It is legal for residents of Puerto Rico to engage in casino gambling at licensed casinos within Puerto Rico. The Commonwealth has, nonetheless, determined to ban all advertising for casino gambling that is directed at residents of Puerto Rico. The purpose of this advertising ban is to keep the residents of Puerto Rico ignorant of, or at least not mindful of, their lawful option to engage in casino gambling, and thereby to diminish their patronage of casinos.

This brief addresses a single question: whether, consistent with the First Amendment, the government may—as Puerto Rico has done—ban truthful, nondeceptive commercial speech directed at the general public because the government is concerned that the speech may persuade individuals to engage in lawful conduct that the government wishes to discourage. It is our submission that such a ban violates the First Amendment.

1. The speech here is commercial advertising and thus falls squarely within this Court's definition of "commercial speech". *Central Hudson Gas & Elec. v. Public Serv. Comm.*, 447 U.S. 557, 562-563 (1980); *Zauderer v. Office of Disciplinary Counsel*, — U.S. —, 105 S. Ct. 2265, 2275 (1985). While such speech is subject to a greater measure of governmental regulation than other forms of speech, this Court has never upheld a ban on commercial speech that is designed to keep members of the public ignorant of truthful, nondeceptive information related to a lawful transaction. This Court's decisions, however, do not unequivocally negate the proposition that there are circumstances in which such a ban on commercial speech might be upheld. We therefore begin by reviewing the three decisions of this Court that establish the present framework for analysis.

In *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976), this Court struck down as violative of the First Amendment a state statute prohibiting licensed

pharmacists from advertising the prices of the prescription drugs that the pharmacists dispense. The asserted justification for the ban had "to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists." *Id.* at 766. The Court recognized that: "The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information." *Id.* at 769. The Court summarized those "assumed" consumer reactions as follows:

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what. [*Id.* at 769-770].

*Virginia Pharmacy Board* "hold[s]" that the First Amendment does not permit the government to advance its regulatory ends by attempting to keep the public ignorant:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional"

pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. *But the choice among those alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.* Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker v. Brown*, 317 U.S. 341 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold. [Id. at 770 (emphasis added)].

Subsequently, in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), the Court again ruled that a ban on commercial speech could not be justified by a claim that keeping truthful, nondeceptive information from the public would advance an important governmental interest. At issue in *Linmark* was a municipal ordinance prohibiting the posting of "For Sale" or "Sold" signs on residential property. The objective of the ban was "to stem . . . the flight of white homeowners from a racially integrated community." *Id.* at 86. The Court stated:

That this ordinance was enacted to achieve an important governmental objective . . . does not distinguish the case from *Virginia Pharmacy Bd.* . . . [In *Virginia Pharmacy Bd.*, w]e expressly recognized the "strong interest" of a State in maintaining "professionalism on the part of licensed pharmacists" . . . But we nevertheless found the Virginia law un-

constitutional because we were unpersuaded that the law was necessary to achieve this objective, and were convinced that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information. For the same reasons we conclude that the Willingboro ordinance at issue here is also constitutionally infirm. [Id. at 95 (emphasis added)].

Thus, after finding that the municipality had "failed to establish that this ordinance is needed to assure that Willingboro remains an integrated community" (*id.*), the Court went on to state:

The constitutional defect in this ordinance, however, is far more basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.*, acted to prevent its residents from obtaining certain information. . . . *The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally."* *Virginia Pharmacy Bd.* denies government such sweeping powers. [Id. at 96-97 (emphasis added)].

In *Central Hudson*, the Court again faced a ban on commercial speech purportedly justified by an important government interest that would be served by keeping truthful, nondeceptive information from the public. At issue in *Central Hudson* was a regulation

banning promotional advertising by an electric utility. The governmental interest asserted in support of the ban was the interest in energy conservation. The state claimed that advertisements promoting products that use electricity would result in greater consumption of such products by members of the public, which in turn would, contrary to the state's interest in energy conservation, result in greater use of energy. This ban on commercial speech was struck down, but in so doing, the Court did not follow the straight line path followed in *Virginia Pharmacy Board* and *Linmark* to reach the same result.

The *Central Hudson* decision does, to be sure, share with the previous cases the following starting proposition:

We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See *Virginia Pharmacy Board*, 425 U.S., at 780, n.8 (STEWART, J., concurring). Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity. [447 U.S. at 566 n.9].

But that decision then suggests that there may be some room for the government to ban truthful, nondeceptive speech about lawful activity "in order to pursue a non-speech-related policy." The Court stated:

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First,

the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive. [Id. at 564].

Applying that approach, the Court in *Central Hudson* concluded that the interest asserted by the state in that case—energy conservation—is "substantial" (*id.* at 568), that there is a "direct link between the state interest in conservation" and the ban on speech (*id.* at 569), but that the ban is "more extensive than necessary to further the state's interest in energy conservation" (*id.* at 569-570) and thus is in violation of the First Amendment. The latter conclusion was based (i) on the fact that the ban precluded advertisements for "products and services that use energy efficiently" (*id.* at 570), and (ii) on the state's failure to demonstrate "that its interest in conservation cannot be protected adequately by more limited regulation of [the utility's] commercial expression" (*id.*).

2. The ban on speech in the instant case fits squarely within the category of prohibitions on speech that this Court held in *Virginia Pharmacy Board* and in *Linmark* are not permitted by the First Amendment. The ban prohibits truthful, non-deceptive commercial speech about lawful activity. The governmental purpose in adopting the ban is to keep certain information from the residents of Puerto Rico so as to prevent those residents from taking lawful actions that the Commonwealth deems "inimical to . . . [their] self-interest and the . . . interest of the [Commonwealth]" (*Linmark*, 431 U.S. at 96)—that is to prevent those residents from exercising their lawful option to engage in casino gambling. *Virginia Pharmacy Board* and *Linmark* rest on the recognition that the "justification" for the ban offered by Puerto Rico is anti-

thetical to the first premises of the First Amendment. The analysis of those cases requires that the ban here be struck down.

On the other hand, as we have discussed, the ban on speech in *Central Hudson* was invalidated on a different basis. In *Central Hudson*, the asserted governmental interest in keeping information from the public was implicitly assumed to be a valid basis for banning commercial speech; that ban was struck down as more extensive than needed to serve that governmental interest.

In this case, unlike *Central Hudson*, the ban at issue encompasses only speech promoting the very activity that the government wishes to discourage—casino gambling. Accordingly, the ban here is congruent with the asserted governmental interest. If that interest may constitute a valid basis for banning commercial speech, the analysis of *Central Hudson* leads to the conclusion that the ban on speech here should be upheld.

This case, then, presents an appropriate occasion to clarify where the law stands as to whether a ban on commercial speech may be justified by a governmental interest in discouraging lawful activity by keeping the public ignorant of truthful, nondeceptive information concerning that activity. In our view, such a “governmental interest” is inherently at odds with the core protection of the First Amendment, and thus the assertion of such an interest impeaches rather than justifies a ban on speech.

3(a). We start with a basic proposition: if the speech in question were not commercial speech but speech entitled to the full measure of First Amendment protection, a governmental objective of keeping the public ignorant of lawful options could not justify banning the speech. Such a governmental objective runs counter to the major

premise of the First Amendment.<sup>1</sup> That premise is perhaps most eloquently stated in Justice Brandeis’ classic concurring opinion in *Whitney v. California*, 274 U.S. 357, 375-376 (1927) (emphasis added) (footnote omitted):

Those who won our independence believed that . . . in [our] government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . They recognized the risks to which all human institutions are subject. But they knew that . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.*

More recently, in *First National Bank v. Bellotti*, 435 U.S. 765, 790-792 (1978), the Court returned to the same understanding:

<sup>1</sup> Because the speech here is an invitation to members of the public to engage in an activity that those individuals have an unrestricted right to engage in—to patronize licensed casinos in Puerto Rico—this case does not implicate the regulation of speech that is an integral part of an unlawful transaction. See *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (the exchange of price and production information among competitors). As this Court has stated, “the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a *component* of that activity.” *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (emphasis added).

We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ." . . . Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. [Citations and footnotes omitted].<sup>2</sup>

As these passages reflect, this Court's decisions establish two basic and interrelated principles respecting the essential nature of the First Amendment's protection of speech. First, the government may not prohibit speech because those in power disagree with the message:

[T]here are some purported interests—such as a desire to suppress support for . . . an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the [regulation of speech]. The general principle that has emerged from this [Court's] cases is that the First Amendment forbids the government

<sup>2</sup> See also, *Thornhill v. Alabama*, 310 U.S. 88, 104-105 (1940):

Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose . . . sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

from regulating speech in ways that favor some viewpoints or ideas at the expense of others. [*Members of City Council v. Taxpayers for Vincent*, — U.S. —, 104 S.Ct. 2118, 2128 (1984)].

See also *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

Second, the free flow of information from all interested parties, not censorship, is the means consistent with the Constitution to deal with questions in controversy. "[T]he remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. at 377 (Brandeis and Holmes, J.J., concurring). "[T]he First Amendment . . . was designed 'to secure 'the widest possible dissemination of information from diverse and antagonistic sources . . .'" *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (citations omitted). "In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

Thus, in general, the First Amendment does not permit government to ban speech because that speech advocates ideas or actions that are viewed by those in power as distasteful, or as inimical to some governmental interest. If the result is to be different when commercial speech is involved, that can be only because some characteristic of commercial speech justifies the difference. We therefore turn next to an examination of whether there is such a characteristic of commercial speech.

(b) (i). At the outset, it is appropriate to recall why this Court has determined that commercial speech is entitled to protection by the First Amendment. When this Court decided in *Virginia Pharmacy Board* to abandon the rule of *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942), that "purely commercial advertising" is without

the protection of the First Amendment, the Court set out in detail the reasons requiring protection of such speech:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener, by far, than his interest in the day's most urgent political debate.

\* \* \*

[S]ociety also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest.

\* \* \*

Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. *So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensable.* [425 U.S. at 763, 764, 765 (emphasis added)].

Thus, this Court found that the basic premises of First Amendment protection discussed above apply as well to commercial speech. Just as the "free flow" of information is necessary to the discussion of political and social issues, "the free flow of commercial information is indispensable" to "intelligent" and "well informed" commercial decisions in our free enterprise economy. Just as diverse political voices must be allowed to speak, competing commercial voices must be given that opportunity. And, commercial voices must be given the opportunity to solicit

customers as a counter to those who advocate that members of the public not patronize their businesses. The reasons for protecting commercial speech identified in *Virginia Pharmacy Board* cannot be vindicated when, as here, speech is banned absolutely because the government fears that members of the public will be persuaded by the speech's message to engage in activity that the government has not regulated but nonetheless wishes to discourage. Indeed, to ban speech on that basis is to strike directly against the concept of a "free flow of information."

In a related context, this Court in *Bolger v. Youngs Drug Products Corp.*, — U.S. —, 103 S.Ct. 2875, 2883 (1983) (citation and footnote omitted), stated:

"... At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." ... We [have] specifically declined to recognize a distinction between commercial and non-commercial speech that would render this interest a sufficient justification for a prohibition of commercial speech.

(ii). To be sure, there are respects in which commercial speech is subject to greater government regulation than other speech. This Court has "not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," *Ohralik v. Ohio State Bar Assn.*, 436 U.S. at 455-456, and has defined with precision the characteristics of commercial speech that may justify greater regulation. Those characteristics do not justify the kind of regulation at issue here.

In *Central Hudson* the Court set out the justifications for close regulation of commercial speech as follows:

In most other contexts, the First Amendment prohibits regulation based on the content of the mes-

sage. . . . Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. . . . In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." [447 U.S. at 564 n.6 (citations omitted)].

See also *Virginia Pharmacy Bd.*, 425 at 771-772 n. 24; *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

These peculiar characteristics of commercial speech do, of course, justify regulation designed to ensure that commercial speech is not misleading. See *Friedman v. Rogers*, 440 U.S. at 16; *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. at 2282-2283. Further, the manner in which commercial speech is communicated may be regulated where that manner—as opposed to the content of the speech—creates opportunities for overreaching, hazards to public safety or injuries to the urban environment. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. at 465 (in person lawyer solicitation of an "unsophisticated, injured, or distressed lay person"); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 508-512 (1981) (commercial billboards).<sup>3</sup> Such types of regulation are directly related to the peculiar characteristics of commercial speech identified in *Central Hudson*. Because commercial advertising is a "hardy breed of expression," exacting regulation as to its accuracy or as to the time, place or manner of its communication is not likely to silence the speech.

<sup>3</sup> The justification for permitting regulation of the commercial speech in *Metromedia*, it should be noted, also permits regulation of non-commercial speech. See *Members of City Council v. Taxpayers for Vincent*, 104 S.Ct. at 2130-2132.

In contrast, these attributes of commercial advertising do not justify a ban on such speech in the interest of keeping the public ignorant of lawful options. Obviously, such a ban is not justified by the fact that "commercial speakers . . . are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activities." For such a ban is intended to apply to speech that is not misleading and is not about unlawful conduct. There is no question that truthful, nondeceptive advertising for casino gambling—an activity that is lawful in Puerto Rico—is covered by the ban here, indeed is the very object of that ban. Neither the fact that the casinos are well situated to make their advertising accurate, nor the recognition that the government has more room to police the methods of communication used by commercial speakers than by political speakers to prevent deception and similar misconduct, provides any basis for prohibiting that advertising altogether.

Similarly, the fact that "commercial speech . . . is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation'" provides no basis for an *absolute ban* on such speech. The ban here is based on the government's objection to the *content* of the message. Thus, the very purpose of the ban is to completely silence the speech. That the speech here may be "hardy"—and thus might survive exacting regulation as to the accuracy of its content or the time, place, or manner of its communication—is of no significance because the speech is totally prohibited.

(ii). If Puerto Rico chooses, the Commonwealth may prohibit casino gambling. Or, Puerto Rico may both permit casino gambling and attempt to convince its residents that the risks of loss outweigh the opportunities of gain. See *Regan v. Taxation with Representation*, 461 U.S. 540, 548-59 (1983). But Puerto Rico has followed neither of these permissible options. Rather, Puerto Rico

has permitted the establishment of gambling casinos open to Puerto Rican residents while prohibiting those casinos from informing those potential customers that the casinos are open for business. That result is contrary to the most basic principles of the First Amendment. If as the Court has said time and again commercial speech is entitled to some form of constitutional protection, it must follow that the government cannot prohibit legitimate businessmen from truthfully and nondeceptively informing the public of their wares.

#### CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Puerto Rico should be reversed.

Respectfully submitted,

ROBERT M. WEINBERG

PETER O. SHINEVAR

1000 Connecticut Avenue  
Washington, D.C. 20036

LAURENCE GOLD

815 Sixteenth Street, N.W.  
Washington, D.C. 20006  
(202) 637-5390  
(Counsel of Record)